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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-79-327

CBS INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N. Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N. Y. 10019

LLOYD N. CUTLER
JOHN H. PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

Attorneys for Petitioner

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

August 28, 1979.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner CBS Inc. ("CBS") respectfully prays that a writ of certiorari issue to review a memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit entered June 4, 1979, affirming the denial of CBS's motion to intervene to oppose entry of a proposed antitrust consent decree.*

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* CBS respectfully requests that this petition be considered together with its petition for certiorari filed on May 7, 1979, in *CBS Inc.* v. *United States District Court for the Central District of California (Kelleher, D. J.), et al.* (No. 78-1685) ("Petition I"). That petition seeks review of a decision of the Court of Appeals denying CBS's petition for mandamus challenging the later entry of the same decree. Because both petitions involve important issues relating to the proper interpretation and enforcement of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), we believe joint review would facilitate consideration of all appellate remedies available to assure compliance with the APPA.

There is some duplication between the two petitions for certiorari, since common elements relevant to the decision of both the mandamus and intervention issues underlie each petition. For the Court's convenience, we have made this petition, which focuses on the intervention issue, generally self-contained.

OPINIONS BELOW

The Memorandum of Decision and Order of the United States District Court for the Central District of California (Kelleher, D. J.), entered on June 20, 1977, in *United States* v. *National Broadcasting Company, Inc.*, Civ. No. 74-3601-RJK (C.D. Cal.), denying petitioner's motion to intervene in that action pursuant to FED. R. CIV. P. 24, is unreported and is set forth in the Appendix to this petition at App. II A-9.*

The memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit affirming denial of petitioner's motion to intervene was entered on June 4, 1979, and has not been reported. It is set forth at App. II A-18.

JURISDICTION

The memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit affirming denial of CBS's motion to intervene was entered on June 4, 1979. This petition for certiorari was timely filed in accordance with 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner sought to intervene in a government antitrust action to challenge a proposed consent decree on the ground that the decree was anticompetitive and would therefore not be "in the public interest", as required by the Antitrust

* References to "App. II " are to the separately bound Appendix to this petition submitted herewith (blue cover). References to "App. I " are to the separately bound Appendix to Petition I (white cover).

Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"). The District Court denied intervention notwithstanding the allegations of petitioner's pleading in intervention, supported by unrebutted expert affidavits and other submissions, that the effect of the decree would be to restrain trade and suppress competition, with resulting direct injury to petitioner in its business and property. After denial of intervention, the District Court proceeded to approve the decree as "in the public interest" on the ground that the decree was consistent with the objectives of the Department of Justice in filing the complaint.

Under such circumstances,

1. Did the Court of Appeals err in affirming denial of petitioner's motion to intervene as of right, solely on the ground that petitioner's interests were adequately represented by the Department of Justice, notwithstanding (a) petitioner's well-pleaded claims that the Department, in proposing a decree that was designed to restrain trade, had been faithless to its mandate under the Sherman Act and (b) the Department's role as petitioner's adversary in a companion case seeking similar relief?

2. Did the Court of Appeals err in affirming denial of permissive intervention as a proper exercise of discretion, where the District Court's principal reason for such denial seemed to be a concern that petitioner's intervention might delay entry of an allegedly anticompetitive decree?

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The constitutional provision, statutes and rule involved in this case are the Constitution of the United States,

Amendment I; the Sherman Act, 15 U.S.C. §§ 1, 2; the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h); and FED. R. CIV. P. 24. The text of Rule 24 is set forth at App. II A-1. The text of the constitutional provision and the statutes is set forth at App. I 1a.

STATEMENT OF THE CASE

1. The Complaint.

The complaint in *United States* v. *NBC* (App. I 9a) was filed in the United States District Court for the Central District of California on December 10, 1974. The complaint alleges that NBC has monopolized and unreasonably restrained "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours" in violation of Sections 1 and 2 of the Sherman Act. Virtually identical complaints making the same charges as to CBS and ABC were filed at the same time.* None of the complaints charges that NBC, CBS or ABC have agreed, conspired or colluded with each other in any way. The *NBC* complaint prays for injunctive relief, *inter alia,* restraining NBC from offering for broadcast entertainment programs produced by NBC and from bargaining for various rights with respect to programs obtained by NBC under licenses from outside program suppliers.

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* *United States* v. *National Broadcasting Company, Inc.,* Civ. No. 74-3601-RJK (*"NBC"*); *United States* v. *CBS Inc.,* Civ. No. 74-3599-RJK (*"CBS"*); *United States* v. *American Broadcasting Companies, Inc.,* Civ. No. 74-3600-RJK (*"ABC"*). Predecessor complaints against each network, virtually identical to the present complaints, were filed in April 1972. Those complaints were dismissed without prejudice on November 13, 1974 (65 F.R.D. 415), because of the government's refusal to comply with discovery orders relating to defendants' defense that the actions had been commenced for the purpose of restraining and intimidating network news coverage and criticism of President Nixon and his administration. Such a prosecutorial purpose is impermissible under the First and Fifth Amendments and rendered the lawsuits constitutionally defective. *See, e.g., Blackledge* v. *Perry,* 417 U.S. 21 (1974); *Oyler* v. *Boles,* 368 U.S. 448 (1962); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *United States* v. *DeMarco,* 550 F.2d 1224 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); *United States* v. *Steele,* 461 F.2d 1148 (9th Cir. 1972). The allegations of that defense were supported by a substantial body of evidence that came to light during the Watergate and related investigations.

Defendants appealed the District Court's order insofar as it provided for dismissal *without* prejudice, but said appeal was dismissed by this Court for want of jurisdiction. *National Broadcasting Co.* v. *United States,* 421 U.S. 940 (1975). The present, virtually identical, complaints were filed within weeks after dismissal of the earlier actions.

2. The Proposed Decree and Accompanying Competitive Impact Statement.

On November 17, 1976, plaintiff and NBC filed a stipulation providing for the entry of a consent decree in the *NBC* action upon compliance with the provisions of the APPA. That proposed decree, with minor modifications, was entered by the District Court on November 28, 1977.* (App. I 20a)

Consistent with the prayer of the complaint, the proposed decree restricts NBC from carrying on its network more than a limited amount of television entertainment programming produced by NBC (Section V(A)), prohibits NBC from obtaining certain rights and interests in television entertainment programming it acquires from outside program suppliers (Sections IV(A); IV(B); VI) and regulates the conduct of negotiations and the terms of trade between NBC and its outside program suppliers (Section VI).

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* Certain of the provisions of the *NBC* decree do not come into effect unless "similar" relief is obtained by plaintiff against both CBS and ABC. (Section VII, App. I 33a) Should the *CBS* or the *ABC* action be dismissed or should "different" relief be had in either case, NBC is permitted to seek a modification of its decree so as not to be placed at a "competitive disadvantage" to CBS or ABC. (Section IX, App. I 34a-35a) *See* Competitive Impact Statement at 13, 14, 41 Fed. Reg. 52015, 52027-28 (1976).

Plaintiff's Competitive Impact Statement, published with the proposed decree as required by 15 U.S.C. § 16(b), conclusorily asserted that the effect of the proposed decree would be to permit the "forces of competition . . . to operate more freely on NBC's program procurement practices" (41 Fed. Reg. at 52021) and that the limitation on NBC's internal production would

> "enhance competition in television entertainment production and exhibition by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers." (*Id.* at 52022)

Plaintiff also asserted in substance that, by enjoining NBC from acquiring various rights from its suppliers at any price, the decree would give those in "other fields" an opportunity to buy these rights without having to compete with NBC. (*Id.* at 52023)

Plaintiff did not offer any expert economic opinion or other evidentiary materials in support of its Competitive Impact Statement. Further, plaintiff represented that there were no materials or documents it considered determinative in formulating the proposed consent decree so that there was nothing it was required to disclose pursuant to 15 U.S.C. § 16(b).

3. CBS's Motion to Intervene.

Following the filing of the proposed decree and Competitive Impact Statement in November 1976, an unprecedented barrage of critical comments was submitted to the Department of Justice, and subsequently transmitted to the court pursuant to the APPA (15 U.S.C. § 16(d)). Virtually all of those comments, submitted by some 70 corporations, associations and individuals, including representatives of

virtually every aspect of the television industry and of many public interest groups, denounced the proposed decree as "anticompetitive" or plaintiff's Competitive Impact Statement as "inaccurate" and "inadequate".*

On April 21, 1977, CBS moved for leave to intervene as of right under Rule 24(a)(2), FED. R. CIV. P., and alternatively for permissive intervention under Rule 24(b)(2), FED. R. CIV. P., for the purpose of opposing entry of the proposed decree. The motion was accompanied by a pleading in intervention which alleged that:

> (1) the proposed decree would suppress competition among producers of television programs;
>
> (2) such a suppression of competition among producers of television programs would severely prejudice CBS, a major purchaser of such programs;
>
> (3) CBS's interest was not being represented adequately by either plaintiff or NBC;
>
> (4) entry of the decree would impair or impede CBS's ability to protect its interest in vigorous competition among producers of television programming; and
>
> (5) the claims and defenses in *United States* v. *CBS* present questions of law and fact in common with those presented in *United States* v. *NBC*.**

CBS's motion and the allegations of its pleading in intervention were supported by the affidavits of several distinguished economists, including Franklin M. Fisher, Professor of Economics at the Massachusetts Institute of

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* The comments and responses of the Department of Justice thereto were published, pursuant to the APPA, at 42 Fed. Reg. 24995-25312 (1977).

** CBS's pleading in intervention is set forth at App. II A-2.

Technology; William J. Baumol, Professor of Economics at Princeton University and New York University; and Paul L. Joskow, Associate Professor of Economics at the Massachusetts Institute of Technology. Those affidavits analyzed the probable competitive consequences of the proposed *NBC* consent decree. CBS also submitted the affidavit of Richard A. Posner, Professor of Law at the University of Chicago Law School, which analyzed whether the proposed decree would be in the "public interest" as required by the APPA.*

The economists concluded that the probable economic effect of the proposed *NBC* consent decree would be (i) to "restrict", "reduce" and "inhibit" competition among producers of television entertainment programming; (ii) to cause increased concentration among such producers; and (iii) to increase prices of the programs supplied to the networks. Professor Posner concluded that the consent decree was "anticompetitive", "inconsistent with the public interest as expressed by the Sherman Act" and, hence, "manifestly contrary to the statutory standard" of the APPA.

The economists viewed the limitation in Section V on NBC's ability to expand its internal production of programming as imposing "cartel-like constraints", providing "a protected enclave to firms which would otherwise be subject to more effective competition by NBC", restricting the sources of supply of television entertainment programming and thus tending to drive up its price. (App. I 109a-10a) Since all three networks face a common supply of programs, they viewed the impact of the decree on CBS as direct and adverse. As stated by Professor Fisher:

> "The aggregate demand of the three networks is undiminished by the decree (*i.e.*, they will each remain free to schedule approximately 3 hours of programming per night and 21 hours per week), but the potential supply to meet that demand is decreased. This necessarily causes an effective reduction in the supply of programs available to CBS and ABC as well as NBC." (App. I 87a-88a) (footnote omitted)

* The Fisher, Baumol, Joskow and Posner affidavits are all set forth in Appendix I at 82a, 109a, 112a and 98a, respectively.

The economists also viewed the restraints imposed by Section VI on the terms upon which NBC and its suppliers could contract for television programming as "increasing concentration" and "restricting competition" in the supply of programming. (App. I 89a)

Based on the affidavits described above, CBS's pleading in intervention alleged that the probable economic effect of the proposed *NBC* decree would be to lessen competition and increase concentration among CBS's suppliers and, thus, to reduce the supply and increase the price of programming to CBS. Entry of the decree would thus have a clear and direct adverse impact on CBS as a buyer of programming. Neither the Department of Justice nor NBC responded to the pleading or submitted any proof rebutting CBS's claims.

4. The District Court's Denial of Intervention.

On June 20, 1977, the District Court denied CBS's motion to intervene, holding that CBS's interest as "a purchaser of television programs who desires to buy in a competitive marketplace" is not the type of "specific, private interest characteristic of private party intervention of right". (App. II A-14 to A-15) The District Court also held that CBS had not made a "conclusive showing on the present record" that the proposed decree would have an anticompetitive effect on the television programming market (App. II A-15) or that CBS would be hampered in acquiring "suitable programs at a competitive price" from

its regular sources (App. II A-15). The court said, however, that the question of whether the proposed decree would have an anticompetitive effect on the television industry involved "a major inquiry which the Court will pursue in its consideration of the decree". (App. II A-15)

The District Court held in the alternative that, even if CBS's interest was cognizable under Rule 24(a), its ability to protect that interest would "not be impaired by disposition of the *NBC* consent decree absent formal intervention" because CBS "currently is in litigation with the government in a similar antitrust action" and many of the provisions of the *NBC* settlement would not become effective "unless the government obtains similar remedies against CBS". (App. II A-15) Moreover, said the District Court, its disposition of the *NBC* decree "will not have a *stare decisis* effect on the CBS litigation". (App. II A-16)

Finally, the court stressed that CBS's "further participation in the consideration of the decree, if appropriate, is not precluded by the denial of its intervention motion" and that, in all events, it was the "primary duty of the government to see that the public interest is served by its antitrust enforcement actions". Hence, "whatever interest of a public nature CBS has in the NBC case would be adequately represented before the Court". (App. II A-16)

The court also concluded that it was neither "necessary nor appropriate" to grant permissive intervention, since a "multiplication of parties with full procedural rights most probably will frustrate, rather than advance, an orderly determination of whether this judgment is in the public interest". (App. II A-14, A-17)

5. The Court of Appeals' Affirmance of the Denial of Intervention.

On July 19, 1977, CBS appealed to the United States Court of Appeals for the Ninth Circuit from the District

Court's denial of its motion to intervene. On June 4, 1979, that court issued a memorandum decision affirming the District Court. The Court of Appeals concluded that CBS was not entitled to intervene as of right because it is "presume[d]" in government antitrust litigation that the government adequately represents the interests of absentee parties, absent a "strong showing", which CBS had allegedly not made, "that the government is not vigorously and faithfully representing the public interest". The Court of Appeals accordingly found it unnecessary to consider whether CBS satisfied the other requirements for intervention as of right. (App. II A-22 to A-23)

The court also held that the District Court had not committed a clear abuse of discretion in denying permissive intervention because the District Court had considered (1) the contentions of CBS that the judgment was "too restrictive"; (2) the question whether intervention "would unduly delay or prejudice the adjudication of the rights of the government and NBC"; and (3) the fact that CBS was not precluded from further participation in the consideration of the decree "if appropriate". (App. II A-24)

6. The District Court's Entry of the Decree and Subsequent Proceedings.

In denying CBS's motion to intervene in June 1977, the District Court had promised a "major inquiry" as to the alleged anticompetitive effect of the proposed decree on the television industry. Seeking that "inquiry", CBS subsequently moved for an order setting an evidentiary hearing on the decree and authorizing it to participate as an "interested person" under 15 U.S.C. § 16 (f)(3).* However, the

* Motions seeking such a hearing were also made by ABC, certain motion picture companies and others.

promised inquiry never eventuated, since before the return date of that motion the District Court on November 23, 1977, approved the proposed decree, without opinion or comment. On December 20, 1977, CBS filed a petition for a writ of mandamus in the Court of Appeals. On January 26, 1978, the District Court filed a Memorandum of Decision Re Consent Decree concluding that entry of the decree was "in the public interest" because it was consistent with the relief sought by the Antitrust Division in its complaint. Thereafter, CBS's petition for mandamus was denied, without opinion, on April 12, 1978, and CBS's petition for rehearing was denied on February 5, 1979. CBS filed its petition for certiorari seeking review of that decision in this Court on May 7, 1979. *See* Petition I, pp. 8-11.

REASONS FOR GRANTING THE WRIT

This petition presents important questions as to whether district court determinations under the APPA that proposed consent decrees are in the public interest are to be subject to effective appellate oversight. If those determinations are unreviewable, there will be no mechanism available to ensure consistent interpretation and enforcement of the APPA. The questions raised here concerning the role of intervention under the Federal Rules of Civil Procedure in ensuring proper enforcement of the APPA should, accordingly, be settled by this Court.*

* Petition I presents questions concerning use of mandamus as a flexible, discretionary means of review of district court public interest determinations under the APPA. When considered together, CBS's two petitions make clear that since consent decree proceedings are by nature nonadversarial with respect to the parties, the absence of some form of judicial review—either by mandamus or as a consequence of intervention—at the behest of aggrieved nonparties will lead to *ad hoc* judicial decision-making and possibly to effective repeal of the APPA's remedial provisions.

The APPA is a new remedial statute designed to promote the procompetitive objective of the antitrust laws and to end "judicial rubber stamping" of consent decrees in government antitrust actions. H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). It reflects congressional recognition of the far-reaching impact of consent decrees in major government antitrust actions and congressional concern that the public interest—and most notably the public interest in a competitive economy—not be neglected in the disposition of such actions through essentially private negotiations between the Antitrust Division and private parties. Accordingly, the APPA provides for publication of a proposed consent decree together with a detailed explanation by the Antitrust Division of its character and rationale in a Competitive Impact Statement (15 U.S.C. § 16(b)), grants interested persons an opportunity to comment on the proposed decree, and imposes upon the district courts the duty to make an independent determination that the proposed decree is in the public interest.*

The APPA specifically contemplates intervention pursuant to the Federal Rules of Civil Procedure. (15 U.S.C. § 16(f)) Congress clearly did not intend the APPA to limit the availability of intervention under Rule 24.** The presumption invoked by the Court of Appeals to support its holding that the Department adequately represents CBS's interest in the *NBC* consent decree proceeding is flatly inconsistent with Congress's mandate under the APPA to end "judicial rubber stamping" of antitrust consent decrees. Intervenors have a useful role to play in affording an adversarial presentation on the "public interest" issue

* *See generally* S. Rep. No. 298, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. (1974).

** *See, e.g.*, remarks of Senator Tunney, co-sponsor of the APPA, quoted at p. 21, *infra*.

that the parties, having settled, are in no position to provide.

Rule 24(a)(2) provides for intervention as of right where the applicant for intervention claims an interest relating to the transaction in suit and is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, unless it is adequately represented by existing parties. Rule 24(b)(2) provides for permissive intervention, in the court's sound discretion, where the putative intervenor's claim or defense involves a question of law or fact common to the main action.

CBS sought to intervene in the *NBC* consent decree proceedings to demonstrate that the proposed *NBC* decree was anticompetitive and hence not "in the public interest" as required by the APPA. CBS's pleading in intervention, supported by affidavits of competent experts, alleged that the decree would drive up the price of television programs by eliminating potential competition and increasing concentration among suppliers. CBS's pleading also alleged that as a major buyer in the market for television programs, CBS has a vital interest in preserving competition among program suppliers. *See Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

Even though CBS's allegations were unrebutted, the District Court denied intervention holding that CBS had not made a "conclusive showing on the present record" of the anticompetitive character of the decree or CBS's injury resulting from it. The Court of Appeals affirmed on the grounds that CBS had not made a "strong showing" that the Government, its adversary in a companion case, had failed to represent CBS's interest adequately.

The contracted availability of intervention in government antitrust consent decree proceedings inherent in the rulings of the courts below is in clear conflict with Congress's purpose in enacting the APPA. These decisions are flatly inconsistent not only with the established standards for intervention under FED. R. CIV. P. 24, but also with effective enforcement of the mandate of the APPA to end "judicial rubber stamping" of consent decrees.

Moreover, as an additional and independent reason for granting the writ, the decisions below are in clear conflict with this Court's decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). In *Cascade*, this Court squarely upheld intervention as of right by purchasers of a product who alleged that a proposed consent decree was inconsistent with the mandate of the antitrust laws and would injure them by decreasing competition among suppliers of their product. Indeed, in *Cascade* the Court was construing the more restrictive version of Rule 24 in effect prior to the liberalization of the Rule in 1966.*

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* Prior to its amendment in 1966, Rule 24(a) provided:

"Upon timely application anyone shall be permitted to intervene in an action:

". . . .

"(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or

"(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

See Cascade, supra, 386 U.S. at 132-36.

1. CBS's Pleading In Intervention Stated a Proper Claim for Intervention As of Right Under Rule 24(a)(2).

Congress made it evident that its primary "public interest" concern in enacting the APPA was the protection of "the public by insuring healthy competition in the future". S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973); H. R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974).

CBS's pleading in intervention, supported by the affidavits of several distinguished experts, averred that the proposed decree would instead *suppress* competition among producers of television entertainment programs, restricting the sources of supply of programming and driving up program prices, to CBS's substantial detriment as a purchaser of such programs.* (App. II A-3 to A-4) Since the parties were urging entry of the decree, under these circumstances, it is impossible that either of them could have adequately represented CBS's interest. CBS thus averred an "interest" in the transaction in suit; an "impairment" of that interest which, as a practical matter, CBS was unable to protect; and inadequate representation of that interest by the parties.

CBS's allegations were clearly sufficient to entitle it to intervene. It is elementary that, in ruling on a motion to

* As the pleading pointed out, the decree placed specific limits on NBC's production of programming. Such a restraint, except when of a temporary nature and ancillary to a decree of divestiture (*e.g., Ford Motor Co.* v. *United States,* 405 U.S. 562, 575 n.10 (1972)), is unprecedented and inexplicable, except as a device to protect outside program suppliers from NBC's actual and potential competition and thus to increase their remuneration. In pursuit of its goal, the proposed decree ignored the fundamental proposition that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors', Brown Shoe Co.* v. *United States,* [370 U.S. 294, 320 (1962)]". *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (emphasis in original); *see Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674, 695 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

intervene, the allegations in the intervention pleading "must be deemed to be true". *Kaufman* v. *Wolfson,* 137 F. Supp. 479, 481 (S.D.N.Y. 1956). As Judge (now Mr. Justice) Blackmun, writing for the Eighth Circuit in reversing a denial of intervention, said:

> "Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with the ultimate results on the merits." *Kozak* v. *Wells,* 278 F.2d 104, 109 (8th Cir. 1960).

Similarly, in *Atlantis Development Corp.* v. *United States,* 379 F.2d 818, 827 (5th Cir. 1967), the Fifth Circuit noted that:

> "[I]t is . . . conceivable that there will be some instances in which the total lack of merit is so evident from the face of the moving papers that denial of the right of intervention rests upon a complete lack of a substantial claim. But it hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all."

In short, a "conclusive showing on the present record", as required by the District Court, or a "strong showing", as required by the Court of Appeals, is not a precondition to intervention. *See Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n.10 (1972) (intervenor's burden of showing inadequate representation by existing parties "should be treated as minimal"); *United States* v. *Simmonds Precision Products, Inc.,* 319 F. Supp. 620 (S.D.N.Y. 1970); *United States* v. *First Nat'l Bank & Trust Co.,* 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central*

Bank & Trust Co. v. *United States,* 391 U.S. 469 (1968) (intervention granted but relief sought by intervenor denied).

Certainly it cannot be said that the allegations of CBS's pleading in intervention were so lacking in merit on their face—so frivolous—that intervention could be denied outright as contemplated in *Atlantis Development, supra.* CBS's contention that the *NBC* decree is anticompetitive was supported by the affidavits of experts whose conclusions were unrebutted.

The affidavits showed that the decree amounts to a cartel arrangement designed to drive up the price of television programming by eliminating the potential competition of NBC in the marketplace. Conversely, raising the price of television programming (in order to "improve the lot of the independent producers and suppliers") was the purpose the Department sought to achieve in proposing the *NBC* decree. (Memorandum of Decision Re Consent Decree, App. I 80a)

Nor did the District Court view CBS's claim that the decree is anticompetitive as frivolous. Indeed, that court acknowledged that CBS's contention required a "major inquiry" (App. II A-15), which it undertook to make but ultimately, inexplicably failed to conduct. Likewise, the Court of Appeals did not intimate that CBS's claim was in any way frivolous.

Once the allegation that the decree is anticompetitive is taken as true for the purpose of deciding the motion, it is readily apparent that the other requirements for intervention under Rule 24(a)(2) are met. Absent intervention, CBS's ability to protect its interest in a competitive market-

place is clearly impaired as a practical matter.* Further, it is obvious that the Government, in urging entry of the decree, could not possibly be adequately representing CBS's interests.

2. The Court of Appeals' View that CBS Was Not Entitled to Intervene as of Right Because Its Interest Was Adequately Represented by the Department of Justice Was Egregiously Wrong and Improperly Limits the Right of Intervention in Antitrust Consent Decree Proceedings.

Perhaps recognizing that the basis for the District Court's determination was dubious, the Court of Appeals grounded its affirmance solely on a finding that CBS's interest was adequately represented by the Department of Justice. The court based that finding on CBS's supposed failure to rebut what it termed a "presum[ption]" applicable to government antitrust litigation "that there is adequate representation of the interests of absentee parties, unless there is a strong showing that the government is not vigorously and faithfully representing the public in-

* It is no answer to hold, as did the District Court, that entry of the decree would not as a practical matter impair CBS's ability to protect its interests since certain of the anticompetitive provisions objected to by CBS would not become effective unless similar relief is obtained in *United States* v. *CBS.* (App. II A-15) The fact is that (1) promulgation and judicial approval of the decree would be likely to have an immediate impact on industry practices even though enforcement of some provisions is deferred; (2) under the APPA, it is a condition precedent to *entry* of a decree that it be shown to be in the public interest; and (3) the decree would have an adverse precedential effect, not only generally but particularly in *United States* v. *CBS,* which is pending before the very same judge. *See also* CBS's reply brief in support of Petition I, at pp. 11-13.

terest''. (App. II A-22)* That holding is erroneous in two respects. First, Rule 24(a) does not require a ''strong showing'' of inadequacy of representation any more than it requires the ''conclusive showing'' at the pleading stage required by the District Court. Second, even if it did, CBS made an extremely strong, in fact unrebutted, showing that the Department of Justice was inadequately representing both the public interest and CBS's private interest by supporting a consent decree totally at odds with the purposes of the antitrust laws it is committed to enforce.

In contrast to the Court of Appeals' requirement of a ''strong showing'' of inadequate representation to intervene under Rule 24(a)(2), this Court held in *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n.10 (1972) that:

> ''The [inadequate representation] requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; *and the burden of making this showing should be treated as minimal.''* (Emphasis supplied)

Trbovich, just as this case, was a litigation brought by the government (the Secretary of Labor) in which an interested third party sought to intervene. In words particularly

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* The Court of Appeals' indulgence in the "presum[ption]" that the Department was adequately representing the public interest may have been influenced by its apparent uncritical acceptance of the view, only briefly touched upon in its decision, that limitation of each network's "in-house" production of entertainment programs would "promote competition among independent producers . . ." (App. II A-19) While such a view faithfully reflects the Department's position, it completely ignores the contrary, unrebutted demonstration by CBS that the decree's restrictions on network program production would *restrain* competition among program producers.

The Court of Appeals also misconceived CBS's contention, understanding it to be that the decree was "too restrictive". (App. II A-24) CBS contended not that the decree was "too restrictive" but that it was *anticompetitive,* and hence totally antithetical to the purposes of the law the decree would ostensibly enforce.

appropriate here, this Court held that intervention should have been granted because the Secretary's efforts to protect the public interest by assuring free union elections would not necessarily adequately protect the intervening union member's private interests, inasmuch as the Secretary's dual functions ''may not always dictate precisely the same approach to the conduct of the litigation''. 404 U.S. at 539.

Nor does the test proposed by the Court of Appeals find any support in the APPA. Nothing in the language or legislative history of the APPA suggests anything other than that Rule 24 is applicable—by its terms and with full force and effect—to government antitrust cases. Indeed, Senator Tunney felt obliged to point out in the Senate debates that the APPA was ''not intended to *broaden* the existing right of intervention''. 119 Cong. Rec. 24599 (1973) (emphasis supplied). But an intention not to broaden can hardly be squared with the Court of Appeals' restriction of the right of intervention by imposing a ''strong showing'' requirement applicable only to the type of case in which the APPA also comes into play.

But even under the unduly strict test imposed by the Court of Appeals, CBS's showing of inadequate representation passed muster. As Judge (now Mr. Justice) Blackmun stated in *Stadin* v. *Union Elec. Co.,* 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied,* 373 U.S. 915 (1963), inadequacy of representation is shown, *inter alia,* ''by the representative having or representing an interest adverse to the intervenor, or by the failure of the representative in the fulfillment of his duty''. *See Brennan* v. *UAW Community Action Program,* 19 Fed. R. Serv. 2d 117, 122 (D. Conn. 1973); 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909 (1972). CBS clearly made a ''strong showing'' on both grounds.

The adversity of interest between CBS and the Department is patent. The essence of CBS's claim was that the Department was faithless to its mandate under the Sherman Act. Furthermore, the Department was prosecuting CBS in a companion case, alleging that CBS had committed the very antitrust violations charged against NBC and seeking against CBS the very relief proposed in the *NBC* decree. To say—as the Court of Appeals did without even discussing the effect of the Department's suit against CBS—that the Department is in a position to "protect" the interest of CBS under such circumstances is ludicrous. Indeed, any such purported "representation" would be a violation of the Code of Professional Responsibility. *See Joseph Skillken & Co.* v. *City of Toledo,* 528 F.2d 867, 876 (6th Cir. 1975), *vacated on other grounds and remanded,* 429 U.S. 1068 (1977).* The presumption the Court of Appeals relied on is fundamentally at odds with the APPA. Congress imposed the requirements of public disclosure, public scrutiny and independent judicial determination precisely because it was not willing to entertain such a presumption.

Moreover, the Department's alleged failure in its duty to protect the public interest—by supporting a consent decree which contravenes the purpose of the laws the Department is charged with enforcing—is unrebutted. CBS's showing of inadequate representation in that regard is at least as strong, if not stronger, than that made in the two cases the Court of Appeals used as examples of a sufficient showing, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967), and *United States* v. *First Nat'l Bank & Trust Co.,* 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co.* v.

* It is noteworthy that the Department in its brief on appeal to the Court of Appeals did not contend that it adequately represented CBS's private interests.

United States, 391 U.S. 469 (1968). (App. II A-23) In *Cascade,* intervention was permitted because the Department had been faithless to the mandate of this Court; in this case, the Department failed to comply with the mandate given it by the Congress in enacting the Sherman Act. In *First Nat'l Bank,* the District Court, finding "about a ninety per cent capitulation" by the Department, permitted intervention, 280 F. Supp. at 263; in this case, the Department did not merely "capitulate", it endorsed as its goal an outcome proscribed by the policy of the Sherman Act.

Under the circumstances, the deference accorded the Department by the Court of Appeals was clearly misplaced. *Cf. United States* v. *Gillette Co.,* 406 F. Supp. 713, 715 (D. Mass. 1975). If courts apply this standard to future proceedings under the APPA, Congress's directive that an independent judicial "public interest" determination be made before a consent decree is entered will be eviscerated.

3. The Court of Appeals' Apparent View that Permissive Intervention Would "Unduly Delay or Prejudice the Adjudication of the Rights of the Government and NBC" Was Clear Error in the Circumstances of This Case.

The Court of Appeals also affirmed the District Court's denial of permissive intervention under Rule 24(b)(2). It recognized that CBS satisfied the "common question of law or fact" requirement of Rule 24(b). However, the court held that the District Court had not abused its discretion in denying intervention, noting the District Court's apparent concern that intervention "would unduly delay or prejudice the adjudication of the rights of the government and NBC" and its statement that further participation by CBS in the consideration of the decree, "if appropriate", was not precluded by denial of intervention. (App. II A-24)

The concern that CBS's participation as a party would unduly complicate or delay the judicial public interest determination is no proper basis for denial of intervention. In the first place, Rule 24 itself contemplates that an intervenor's exercise of procedural rights shall be subject to judicial control appropriate to the nature of the proceedings. The Advisory Committee's Note to the 1966 Amendments to Rule 24 explicitly provides:

> "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." (Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 111)

Indeed, the presence of an intervenor may simplify and expedite district court proceedings under the APPA where, for example, the intervenor (rather than the court) undertakes to develop and present economic or other data needed to assess the likely competitive impact of a decree.*

Furthermore, with or without intervention, the district court under the APPA may on its own motion (1) take testimony of government officials or expert witnesses, (2) appoint a special master, outside consultants or expert witnesses, (3) request and obtain the views of any person, (4) authorize full or limited participation in proceedings before the court by interested persons or agencies, or (5) take such other action in the public interest as it may deem appropriate. (15 U.S.C. § 16(f)) The use of one or more of

* An intervenor's right to appeal, if exercised, need not have the effect of delaying the entry, effectiveness or enforcement of a consent decree, except, of course, where the district or appellate court decides to stay enforcement pending appeal. *See* FED. R. APP. P. 8.

such procedures may, quite appropriately, complicate or delay district court proceedings. But such procedures are explicitly authorized by the APPA and their use is quite obviously intended where appropriate. *See* S. Rep. No. 298, 93d Cong., 1st Sess. 6. Congress never hinted that its interest in keeping consent decree proceedings simple could or should take precedence over the overriding and fundamental policy of the APPA that district courts employ whatever procedures were necessary to an informed and independent public interest determination. Hence, the question of whether intervention is authorized by Rule 24 is separate and distinct from the question of whether the means to be employed by the district court in making its public interest determination are or are not complex or time consuming.

The "further participation" which the District Court held out as an appropriate substitute for intervention turned out to be an utterly empty hope. In the ultimate event the court did not authorize any such participation whatsoever. Thus, after denying CBS's motion to intervene, it proceeded to enter the decree without even ruling on CBS's pending motion to set an evidentiary hearing under 15 U.S.C. § 16(f), and, indeed, without obtaining any further views from any source as to the appropriateness of the decree.

Also, Rule 24(b) counsels only against permissive intervention which will "*unduly* delay or prejudice the adjudcation of the rights of the original parties." (emphasis supplied) Rule 24(b) thus recognizes that permissive intervention may cause some justifiable delay in adjudicating the rights of the original parties to accommodate the interests of judicial economy in resolving related claims in a single litigation. Rule 24(b) requires that a balance be struck between the possible delay attendant upon inter-

vention and the contribution which intervention may make to an informed adjudication of important and similar claims of interested persons other than the original parties. In this case, permissive intervention by CBS would advance, not frustrate, an orderly and final determination of the important public interest issue raised by this decree.*

Indeed, CBS's intervention offered the opportunity to resolve promptly, at both the trial and appellate levels, a central and possibly dispositive issue—the propriety *vel non* of the relief being sought by the government—not only in the *NBC* case but in the *CBS* and *ABC* cases as well.

CONCLUSION

The denial of CBS's motion to intervene manifests not only a flagrant disregard of the proper standards for intervention under FED. R. CIV. P. 24, but also a pervasive and inappropriate reluctance on the part of the courts below to recognize the increased responsibilities imposed on them by the APPA to ensure that entry of a government-sponsored consent decree is in reality "in the public interest". Such decisions, if allowed to stand, will utterly frustrate the important purposes that Congress sought to serve in enacting the APPA.

For the reasons above stated, a writ of certiorari should issue to review the decision of the United States Court of

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* As noted above, CBS's presence as a party would not automatically carry with it such "full-fledged procedural rights" as would disable a district court from insuring the efficient conduct of whatever proceedings it chooses to pursue under 15 U.S.C. § 16(f)(3).

Appeals for the Ninth Circuit affirming denial of CBS's motion to intervene.

August 28, 1979

Respectfully submitted,

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N. Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N. Y. 10019

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

LLOYD N. CUTLER
JOHN H. PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

Attorneys for Petitioner

FILED
AUG 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-79-327

CBS INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APPENDIX II)

Of Counsel:
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N. Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N. Y. 10019

LLOYD N. CUTLER
JOHN H. PICKERING
1666 K Street, N.W.
Washington, D. C. 20006
Attorneys for Petitioner

August 28, 1979

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Constitutional Provision, Statutes and Rule Involved

[The constitutional provision and statutes are set forth in Appendix I at 1a-6a].

RULE 24, FEDERAL RULES OF CIVIL PROCEDURE

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Pleading In Intervention

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil Action No.

74-3601-RJK

—o—

UNITED STATES OF AMERICA,

Plaintiff,

against

NATIONAL BROADCASTING COMPANY, INC.,

Defendant.

CBS INC.,

Intervenor.

—o—

ROBERT S. RIFKIND
LLOYD N. CUTLER
WILLIAM W. VAUGHN
CRAVATH, SWAINE & MOORE
WILMER, CUTLER & PICKERING

and

O'MELVENY & MYERS
611 West Sixth Street
Los Angeles, California 90017
(213) 620-1120

Attorneys for Intervenor CBS Inc.

Pleading In Intervention

PLEADING IN INTERVENTION

CBS INC., by its attorneys, alleges:

1. CBS Inc. ("CBS") is a corporation organized and existing under the laws of the State of New York. CBS is engaged in the business, among others, of (a) operating five television stations, owned by it, each of which is engaged in local broadcasting under FCC licenses, and (b) operating the CBS Television Network ("CTN") which makes available a comprehensive schedule of news, public affairs, instructional, children's, sports, religious, documentary, entertainment and other programming to those five television stations and to approximately 200 independently owned and operated television stations affiliated with CTN. CBS sells to advertisers the right to have their commercial announcements broadcast in association with particular network programs by those of CBS's owned stations and its affiliated stations that choose to broadcast those programs.

2. Most of the entertainment programming offered by the CBS Television Network is obtained by CBS under licensing arrangements with program producers. CBS continually seeks out potential programs and is continually entering into arrangements for the licensing, development and production of such programs.

3. On November 17, 1976, plaintiff United States of America and defendant National Broadcasting Company ("NBC") filed with this Court a Proposed Consent Judgment for the Court's consideration pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1974) ("APPA").

4. The Proposed Consent Judgment is anticompetitive, because it would suppress competition among producers of television entertainment programming and thereby restrict the supply of programming and drive up program prices.

Pleading In Intervention

5. Because it is anticompetitive, the Proposed Consent Judgment is contrary to the public interest, as defined by the Sherman Act, 15 U.S.C. § 1, *et seq.*, and the APPA.

6. Because it is anticompetitive, the Proposed Consent Judgment would prejudice CBS's interest as a licensee of television entertainment programming.

WHEREFORE, CBS respectfully prays that the Court not enter the Proposed Consent Judgment submitted by the Government and NBC, or any other judgment that would have the effect of suppressing competition among producers of television programming, and that the Court order such other and further relief as the nature of the case may require and the Court may deem just and proper.

Dated: April 20, 1977.

By /s/ ROBERT S. RIFKIND
Robert S. Rifkind
Attorney for Intervenor
CBS Inc.

Notice of Motion and Motion to Intervene

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 74-3601-RJK

—o—

UNITED STATES OF AMERICA
Plaintiff,

against

NATIONAL BROADCASTING COMPANY, INC.,
Defendant.

CBS INC.,
Applicant for Intervention.

—o—

ROBERT S. RIFKIND
LLOYD N. CUTLER
WILLIAM W. VAUGHN
CRAVATH, SWAINE & MOORE
WILMER, CUTLER & PICKERING

and

O'MELVENY & MYERS
611 West Sixth Street
Los Angeles, California 90017
(213) 620-1120

Attorneys for CBS Inc.

Notice of Motion and Motion to Intervene

NOTICE OF MOTION AND MOTION TO INTERVENE UNDER RULE 24, FED. R. CIV. P.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on May 10, 1977, at 10:00 a.m., or as soon thereafter as counsel may be heard, CBS Inc. ("CBS"), in the courtroom of the Hon. Robert J. Kelleher, United States District Judge, United States Courthouse, 312 North Spring Street, Los Angeles, California, will make the within motion under Rule 24, Fed. R. Civ. P., for an order permitting CBS to intervene in this action.

Dated: April 20, 1977.

By /s/ ROBERT S. RIFKIND
Robert S. Rifkind
Attorney for Intervenor
CBS Inc.

Notice of Motion and Motion to Intervene

MOTION

CBS hereby moves the Court:

(1) for leave to intervene as of right in this action pursuant to Rule 24(a)(2), Fed. R. Civ. P.;

(2) in the alternative, for leave to intervene in this action pursuant to Rule 24(b)(2), Fed. R. Civ. P.

This motion is made upon the grounds that:

(1) the proposed consent decree filed with the Court by the Government and the National Broadcasting Company ("NBC") would suppress competition among producers of television programs;

(2) such a suppression of competition among the producers of television programs would severely prejudice CBS, which is a major purchaser of such programs;

(3) CBS's interest is not represented adequately by the Government or NBC;

(4) entry of the proposed consent decree would impair or impede CBS's ability to protect its interest in vigorous competition among producers of television programming; and

(5) CBS's claims or defenses in *United States* v. *CBS Inc.*, Civ. No. 74-3599-RJK (C.D. Cal.), and the present action have questions of law and fact in common.

This motion is based upon the accompanying Notice of Motion, the supporting memorandum submitted herewith,

Notice of Motion and Motion to Intervene

the affidavits of William J. Baumol, Paul L. Joskow, and Roger H. Cummings and the comments of CBS on the Proposed Decree, annexed to the supporting memorandum as Appendices A to D, CBS's Pleading in Intervention, the proposed Final Consent Judgment filed by the Government and NBC, the Government's Competitive Impact Statement, and all other papers and pleadings filed in this action.

Dated: April 20, 1977.

By /s/ ROBERT S. RIFKIND
Robert S. Rifkind
Attorney for Intervenor CBS Inc.

District Court Memorandum of Decision and Order

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 74-3601-RJK

—o—

UNITED STATES OF AMERICA,
Plaintiff,

v.

NATIONAL BROADCASTING COMPANY, INC.,
Defendant.

—o—

MEMORANDUM OF DECISION AND ORDER

This is a civil antitrust action brought by the government pursuant to § 4 of the Sherman Act, 15 U.S.C. § 4 (1970), charging defendant NBC with violations of §§ 1 and 2 of the Sherman Act in connection with the network's practices and activities in producing, procuring and distributing prime time television programs. On November 17, 1976, pursuant to the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16, the parties filed with the Court a proposed consent judgment. Before such judgment may become final, the Court, following a period of publication of the proposed judgment and review of public comments filed with respect thereto, must determine "that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e) (1974). Presently pending before the Court are two separate motions to intervene in this case for the stated purpose of protecting interest allegedly affected by

the terms of the proposed judgment. Teleprompter Corp., representing various members of the pay cable television industry, has moved to intervene pursuant to F.R.C.P. 24, or otherwise participate in the proposed decree. The second prospective intervenor, CBS, Inc., also seeking formal intervenor status under Rule 24, is itself a party defendant in a similar antitrust action filed by the government in this Court. That action presently is in discovery. Both parties seek to obtain intervenor status so as to bring before the Court certain positions and arguments bearing on particular terms of NBC's proposed settlement with the government.

Both Teleprompter and CBS move for leave to intervene pursuant to F.R.C.P. 24(a), which permits a party to intervene as of right if certain conditions are satisfied, or in the alternative, pursuant to F.R.C.P. 24(b), which authorizes a court to grant permissive intervention. To qualify for intervention of right, a party must satisfy four basic requirements: (1) timely application; (2) the party must have an interest in the subject matter of the suit; (3) as a practical matter, the interest will be impaired by disposition of the action without the party's intervention; and (4) existing parties cannot adequately represent the moving party's interests. *See* F.R.C.P. 24(a); *Stockton* v. *United States*, 493 F.2d 1021, 1022-23 (9th Cir. 1974). If intervention of right is not available, a party may seek permissive intervention when its claim or defense has a question of law or fact in common with the main action.

MOTION OF TELEPROMPTER

Teleprompter represents over twenty members of the pay cable television industry (pay cable movants) who seek intervention in order to demonstrate that the proposed consent decree is anticompetitive and not in the public interest with respect to its treatment of NBC's practice of obtaining exclusive right in feature theatrical films against members of the pay cable television industry. The original proposed consent decree, filed on November 17, 1976, contained a provision placing certain restrictions on NBC's right to obtain exclusive rights against pay cable television. Deeming this provision a ratification of an anticompetitive and predatory practice of NBC, the pay cable movants on April 1, 1976, sought leave to intervene in order to challenge the substance and perceived consequences of this provision. Thereafter, apparently in response to numerous public comments filed pursuant to the procedures established by the APPA, the government and NBC filed with the Court an amended proposed consent judgment which deletes in its entirety the pay cable provision. The proposed decree now before the Court is silent on NBC's ability to obtain exclusive rights as against pay cable television. Notwithstanding the deletion, the pay cable movants press forward with their application for intervention, considering their formal participation in the case just as important under present conditions in order to advance their argument that the absence in the proposed judgment of adequate and affirmative relief against the practice of exclusivity is not in the public interest.

To obtain intervention of right, the pay cable movants must demonstrate a "significantly protectable interest" in the subject matter of the suit and, as a practical matter, that their ability to protect that interest may be impaired or impeded by disposition of the action absent their intervention. *See Donaldson* v. *U.S.*, 400 U.S. 517, 531 (1971); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). The interest asserted by the pay cable

movants is an interest to be free from anticompetitive and predatory practices in their industry. In particular, they see the NBC case as a means of achieving the cessation of a practice that has significantly and economically affected them for a number of years and which in their view is highly anticompetitive. The fact that NBC's custom of obtaining exclusive rights in feature films as to pay cable television is a part of a wider network of practices affected by the proposed judgment suggests that the interest pursued by the pay cable movants is not totally dissimilar to the interests of the government in this action. Nonetheless, it is questionable whether the pay cable television industry's interest in seeing an end to the networks' acquisition of exclusive rights is directly implicated in this suit now that the pay cable provision has been dropped. Under the now prevailing conditions, the interest of the pay cable parties has shifted from a position of contesting a provision which perhaps could have had tangible and adverse impact on the industry in the form of ratifying an allegedly anticompetitive practice to a position of urging the expansion of the remedies sought by the government to cover other possibly anticompetitive conditions. Because of the deletion of the pay cable provision, the interests of the pay cable movants necessarily have become less specific and urgent. Under the original decree there was evidence that the pay cable provision may set industry standards governing the practice of acquiring exclusive rights; the present decree merely ignores the issue, resulting in neither ratification nor rejection. On balance, the interest of the pay cable movants seems to fall short of the type of interests contemplated by F.R.C.P. 24(a).

Even if the Court were to conclude that the pay cable movants have a significantly protectable interest in this action, it could not find that as a practical matter their

ability to protect that interest will be impaired or impeded by disposition of this case absent their formal intervention.

First, it is patently clear that the proposed decree now before the Court, if approved, will have no *res judicata* effect on any future private or government antitrust action challenging NBC's practice of obtaining exclusive rights against pay cable television. No legal barriers to such a suit by the pay cable movants are introduced by disposition of this matter. Moreover, the Court's action on the decree should not result in any barriers of a practical nature; with the deletion of the pay cable provision, there exists no possibility that disposition of the NBC case will impose a *stare decisis* obstacle to a future challenge of the exclusivity practice. *See Atlantis Development Corp.* v. *U.S.*, 379 F.2d 813 (5th Cir. 1967); *Neusse* v. *Camp*, 385 F.2d 694 (D.C.Cir. 1967).

Second, the APPA provides an opportunity for the pay cable industry to bring before the Court, in ways other than by intervention, its views on the NBC proposed judgment. The APPA expressly mentions the possibility of full or limited participation by interested parties by way of amicus curiae or other roles as the Court deems necessary and appropriate. Indeed the pay cable movants already have filed with the government and the Court extensive comments regarding the advisability of affirmative relief against NBC's practice of acquiring exclusive rights against the pay cable television industry. These comments serve as a means of bringing before the Court various views not expressed by the named parties in the case and provide the pay cable movants an opportunity to achieve significant protection of their asserted interests. It must be remembered, however, that for purposes of F.R.C.P. 24(a), the controlling test is not whether an inter-

ested party is offered the utmost means to achieve the relief it seeks, but rather whether in the event intervention is denied disposition of the action may as a practical matter impair its ability to protect its interest in another forum at another time. Since the pay cable movants would suffer no such impairment, their application for intervention of right must be denied.

Permissive intervention under F.R.C.P. 24(b) is left to the discretion of the Court. *See* 3B Moore, Federal Practice ¶ 24,10[4]. In light of the opportunities for informal participation provided by the APPA and the pay cable industry's involvement in the action through the public comments it has filed, the Court does not consider formal intervention appropriate. This discretion is exercised with the view in mind that the public interest is best served by the fullest, yet most efficient consideration of the proposed settlement and a multiplication of parties with full-fledged procedural rights most probably will frustrate, rather than advance, an orderly determination of whether this judgment is in the public interest.

MOTION OF CBS

The interest asserted by CBS in the NBC action is that of a purchaser of television programs who desires to buy in a competitive marketplace. CBS contends the probable effect of the consent decree, if approved as presently proposed, would be a diminution in the supply of television programming and an increase in its price. Its interest as a primary purchaser of television programs, therefore, will as a practical matter be impaired by approval of the proposed judgment.

CBS's interest in the subject matter of the NBC case is not the type of specific, private interest characteristic of

private party intervention of right. *See Toles* v. *United States,* 371 F.2d 784 (10th Cir. 1967); *Atlantis Development Corp.* v. *United States,* 379 F.2d 818 (5th Cir. 1967). There is no conclusive showing on the present record that the consent settlement, if approved in its proposed terms, would result in a lessening of competition in the television programming market or have any other direct anticompetitive effect on the television industry. That of course is a major inquiry which the Court will pursue in its consideration of the decree. Not only is it undetermined that approval of the decree will result in a lessening of competition, it is equally uncertain that CBS will be directly and adversely affected by restrictions on NBC's ability to produce, procure and distribute prime time television programs. CBS does not rely upon NBC to supply any appreciable number of programs exhibited on the CBS network. The decree does not impose restraints on CBS's practices of procuring and producing television programming. And there has been no compelling showing that CBS will be hampered in acquiring from its regular sources suitable programs at a competitive price.

Even if the Court were to find that CBS has an interest in the action cognizable under F.R.C.P. 24(a), CBS's ability to protect that interest will not be impaired by disposition of the NBC consent decree absent formal intervention by CBS. CBS currently is in litigation with the government in a similar antitrust action which, if the government prevails, may result in much the same relief contained in the NBC settlement. Many of the provisions of that settlement, however, will not become effective unless the government obtains similar remedies against CBS. CBS thus stands fully capable, through its own litigation, to block the implementation of many of the changes it finds objectionable. More-

over, because the NBC case now involves a consent decree, which by its express terms does not bind the parties to any adjudication or admission of fact or law, disposition of the proposed decree will not have a *stare decisis* effect on the CBS litigation.

To the extent that CBS has an interest of a public nature in the NBC case, namely an interest in keeping television programming markets competitive, the APPA offers a number of safeguards to insure that such an interest is effectuated. Foremost, the law requires that before any government antitrust action may be settled by consent, the Court must be satisfied that the proposed judgment is in the public interest. 15 U.S.C. § 16(e). In conjunction with this determination, the Court is given broad authority to solicit and consider expert testimony, the views of all interested parties, and the like, and to take whatever steps, including the arrangement of participation by interested persons, the Court deems appropriate in order to give the proposed decree full ventilation. In this regard CBS has to date filed with the government and the Court extensive comments on the proposed judgment and its further participation in the consideration of the decree, if appropriate, is not precluded by the denial of its intervention motion. Secondly, the APPA affirms the primary duty of the government to see that the public interest is served by its antitrust enforcement actions. The Court is assured that with the procedures established by the APPA, together with the government's obligation to protect the interest of the public, whatever interest of a public nature CBS has in the NBC case will be adequately represented before the Court.

Based on the foregoing, the Court finds that CBS has not satisfied the requirements of intervention of right. Additionally for many of the reasons discussed above with

respect to Teleprompter's motion, the Court does not consider it necessary nor appropriate to grant CBS permissive intervention.

FUTURE PROCEEDINGS

Denial of these motions to intervene does not preclude participation by interested parties in the NBC action in other ways short of intervention. To the extent that a hearing, the taking of expert testimony, or other steps are necessary to make the determination required by law, the Court has the discretion to fashion the participation of interested parties accordingly.

IT IS ORDERED that the motions of Teleprompter and CBS respectively to intervene are denied and the Clerk of the Court will send, by United States mail, to counsel for the parties a copy of this Memorandum of Decision and Order.

Dated: June 20, 1977.

/s/ ROBERT J. KELLEHER

.....

Robert J. Kelleher
United States District Judge

FILED
June 20, 1977

Clerk, U.S. District Court
Central District of California

By Deputy

Court of Appeals Memorandum

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 77-3381

—o—

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant-Appellee,

and

CBS INC.,

Applicant for Intervention-Appellant.

No. 78-1068

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant-Appellee,

and

COLUMBIA PICTURES INDUSTRIES, INC., et al.,

Applicants for Intervention-Appellants.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Court of Appeals Memorandum

Before:

CARTER and WRIGHT, Circuit Judges, and SOLOMON,* District Judge

MEMORANDUM

In these consolidated appeals, CBS and six independent suppliers of television entertainment programs (CPI) appeal from the denial of their motions for leave to intervene in an antitrust action brought by the United States (government) against the National Broadcasting Company (NBC).

We affirm.

In 1974, the government filed three separate, identical antitrust actions against NBC, CBS and the American Broadcasting Company (ABC). The government charged each of the television networks with violating the Sherman Act by combining with affiliated stations to monopolize prime time entertainment programming shown on that network. This appeal arises out of the action against NBC.

To promote competition among independent producers like CPI, the government sought to limit each network's "in-house" production of entertainment programs. The government also sought to restrict the program rights which the networks may obtain from independent producers.

In November 1976, the government and NBC agreed on the terms of a proposed final consent judgment. In essence, the judgment would

(1) enjoin NBC from acquiring certain rights in programs other than the right of first network exhibition, and

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

enjoin NBC from syndicating programs—restrictions which are already in effect under FCC rules;

(2) prohibit NBC from refusing to broadcast an independent producer's program unless the producer granted NBC certain rights in the program—a prohibition which would take effect immediately;

(3) limit the number of prime time entertainment programs NBC may produce itself for exhibition on NBC stations—this limitation would not take effect until similar restrictions were placed on CBS and ABC; and

(4) restrict the terms which NBC may include in contracts with independent producers—most of these restrictions would not take effect until similar restrictions were placed on CBS and ABC.

Before a district court may approve a proposed consent judgment, the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16(b)-(h), requires that it "determine that the entry of such judgment is in the public interest."

The APPA sets out the matters which a district court may consider in making its determination. 15 U.S.C. § 16(e). These include

> "the competitive impact of such judgment . . . and any other considerations bearing upon the adequacy of such judgment; [and] the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial."

The APPA also provides that in making its public interest determination the district court may, in its discretion, "authorize full or limited participation in proceedings before the court by interested persons, including . . . intervention as a party pursuant to the Federal Rules of Civil Procedure, . . . or participation in any other manner and extent which serves the public interest as the court may deem appropriate." 15 U.S.C. § 16(f).

The government filed and published a competitive impact statement on the proposed consent judgment. Many interested parties—including CBS, CPI, ABC, pay cable companies, and Congressmen—filed with the court extensive written comments on the competitive impact statement. CBS complained that the consent judgment was too restrictive. CPI complained that it was not restrictive enough.

In April 1977, CBS filed a motion for leave to intervene in the NBC action under Rule 24(a)(2) and 24(b)(2) Fed. R.Civ.P. A month later, in response to the comments submitted on its competitive impact statement, the government amended the proposed judgment.

In June 1977, CPI moved to intervene in the NBC action under the same rules for "the limited purpose of demonstrating that the proposed consent decree . . . is not in the public interest. . ."

CBS and CPI both submitted voluminous briefs in support of their motions. The district court denied the motions to intervene.

In November 1977, the district court approved the proposed consent judgment.

CBS and CPI appeal from the denial of their motions to intervene.

We have jurisdiction to review the denial of those motions. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas*

Co., 386 U.S. 129 (1967); *Brennan* v. *Silvergate,* 503 F.2d 800 (9th Cir. 1974).

I. *Intervention of Right.*

Under Rule 24(a)(2) an applicant is entitled to intervene when

> " . . . the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Therefore, even if the applicant satisfies the first two criteria, it may not intervene if its interest is adequately represented by existing parties to the action.

In government antitrust litigation, the court will presume that there is adequate representation of the interests of absentee parties, unless there is a strong showing that the government is not vigorously and faithfully representing the public interest. *United States* v. *Hartford-Empire Co.*, 573 F.2d 1 (6th Cir. 1978); *United States* v. *Associated Milk Products Inc.*, 534 F.2d 113 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1977).

CBS and CPI contend that their interests in this action are not adequately represented by the government.

There are only a few cases in which a private party has been permitted to intervene in an action in which the government represents the public interest. In each case the proposed intervenors made a strong showing of inadequate representation.

Such a showing was made in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra.* There, in an earlier decision the Supreme Court held that El Paso's acquisition of the Pacific Northwest Pipeline Corporation violated the Clayton Act, and El Paso was ordered to divest itself of Pacific Northwest without delay. Instead of complying with the divestiture order, El Paso persuaded the government to negotiate a settlement. Cascade, whose sole supplier of gas was Pacific Northwest, sought to intervene under Rule 24(a)(2). The district court denied intervention and ultimately approved the settlement. On appeal, the Supreme Court held that Cascade was entitled to intervene because "the United States knuckled under to El Paso." *Id.* at 141.

Similarly, in *United States* v. *First National Bank and Trust Co. of Lexington,* 280 F. Supp. 260 (D.C. Ky. 1967), *aff'd per curiam sub nom. Central Bank and Trust Co.* v. *United States,* 391 U.S. 469 (1968), the trial court allowed intervention after it found "about a ninety per cent capitulation" by the government.

Here, neither CBS nor CPI made a strong showing that the government inadequately represents their interests. For this reason, they fail to satisfy the third requirement of Rule 24(a)(2). The district court correctly denied their motions to intervene as of right.

Under the circumstances, it is unnecessary to consider whether CBS or CPI satisfied the two other criteria for intervention.

II. *Permissive Intervention.*

CBS and CPI contend that even if they are not entitled to intervene as of right, the district court erred in denying them leave to intervene under Rule 24(b)(2).

Court of Appeals Memorandum

Under Rule 24(b)(2),

> "Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

CBS and CPI both satisfy the "common question of law or fact" requirement of the rule. But even when that requirement is met, permissive intervention is within the sound discretion of the district court. *May* v. *Commissioner of Internal Revenue*, 553 F.2d 1207 (9th Cir. 1977).

In exercising its discretion the district court considered the lengthy written comments on the proposed consent judgment, the contentions of CBS that the judgment was too restrictive and those of CPI that it was not restrictive enough. The court also considered whether intervention by CBS or CPI or either of them would unduly delay or prejudice the adjudication of the rights of the government and NBC. The court stated that "further participation [by CBS and CPI] in the consideration of the decree, if appropriate, is not precluded by the denial of [their] intervention motion[s]."

Denial of a motion to intervene under Rule 24(b)(2) may not be disturbed on appeal unless there was a clear abuse of the court's discretion. *Allen Calculators Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944); *U.S. Postal Service* v. *Brennan*, 579 F.2d 188 (2nd Cir. 1978); *May* v. *Commissioner of Internal Revenue, supra.*

Neither CBS nor CPI has shown that the district court abused its discretion in this case.

Court of Appeals Memorandum

The denial of the motions for leave to intervene under Rule 24 is

AFFIRMED.

FILED
June 4, 1979

Emil E. Melfi, Jr. Clerk
U.S. Court of Appeals

Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

Nos. 79-327 and 79-354

In the Supreme Court of the United States

OCTOBER TERM, 1979

CBS INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COLUMBIA PICTURES INDUSTRIES, INC., ET AL,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

JOHN J. POWERS, III
PETER L. DE LA CRUZ
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-327

CBS INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (CBS Pet. App. A18-A25; CPI Pet. App. 76a-82a)[1] is not yet reported. The memorandum opinion (CBS Pet. App. A9-A17) and order (CPI Pet. App. 37a) of the district court are unreported.

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[1]"CBS Pet. App." refers to the appendix to the petition in No. 79-327; "CPI Pet. App." refers to the appendix to the petition in No. 79-354.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1979. The petition in No. 79-327 was filed on August 28, 1979; the petition in No. 79-354 was filed on September 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' motions to intervene in the consent-decree proceedings of a civil antitrust suit brought by the United States were properly denied.

STATEMENT

On December 10, 1974, the United States filed a complaint charging that the National Broadcasting Company, Inc. ("NBC") had combined with its affiliated stations to use its control over access to network air time to restrain and monopolize prime-time television entertainment programming exhibited on that network, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (CPI Pet. App. 8a-17a). Substantially identical complaints were filed simultaneously against the other two commercial television networks. *United States* v. *CBS Inc.*, No. 74-3599-RJK (C. D. Cal.); *United States* v. *American Broadcasting Cos.*, No. 74-3600-RJK Cal.).[2]

[2]Similar complaints had been filed against the three networks in April 1972. They were dismissed without prejudice in November 1974. *United States* v. *National Broadcasting Co.*, 65 F.R.D. 415 (C.D. Cal. 1974), appeal dismissed for want of jurisdiction, 421 U.S. 940 (1975). The networks alleged that the suits had been instituted for impermissible purposes. Although the government denied these allegations, the court, after the government was unable to comply with certain discovery demands, determined that dismissal without prejudice and filing new complaints during a new administration would be the most expeditious means of dispelling the allegations.

On November 17, 1976, the United States and NBC filed a proposed final judgment. In essence, it enjoins NBC from obtaining any interest in television entertainment programming produced by others, except for the right to network exhibition (CPI Pet. App. 21a-22a), and limits for ten years the amount of programming NBC may produce for use on its network (CPI Pet. App. 22a-23a).[3] Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. 16(b)-(h), the proposed judgment, a competitive impact statement, written comments by interested members of the public, and responses by the United States were appropriately filed and published. 42 Fed. Reg. 24996-25312 (1977). Petitioners filed lengthy comments criticizing the decree, CBS claiming that it went too far, CPI asserting that it did not go far enough. *Id.* at 25126-25153, 25170-25253. Both the government and the district court considered these comments. *Id.* at 25160-25167, 25254-25266; CPI Pet. App. 51a-61a.

In response to the various comments, the United States and NBC filed a stipulation on May 12, 1977, amending the proposed judgment.[4] The stipulation also preserved litigating rights on subject matter not treated in the proposed jugdment. 42 Fed. Reg. 24997 (1977).

[3]It does not limit the amount of programming NBC may produce for sale to other networks (CPI Pet. App. 44a, 46a).

[4]One significant change was the deletion of a pay-cable-exclusivity section, which was opposed by pay cable and other interests. Although the United States intended that section to operate as a limit on the exclusivity terms that NBC could obtain, many of those who commented felt that it would put the government's imprimatur on activity considered abusive. The comments convinced the government that the section would not provide desirable relief, and the section was deleted. 42 Fed. Reg. 25112-25114 (1977).

On April 20, 1977, before the United States had filed the amended proposed final judgment or its responses to public comment, petitioner CBS Inc. ("CBS") moved to intervene in the government's action against NBC. The district court denied the motion. It noted that CBS lacked any specific interest and that there was no showing that the decree would directly and adversely affect CBS (CBS Pet. App. A14-A15). Moreover, the court observed that CBS could protect its position by action in its own suit because certain provisions of the consent judgment are not effective unless similar relief is granted in the CBS and ABC litigation (CBS Pet. App. A15-A16). Thus, although CBS had filed comments and could participate informally, intervention was not warranted.

On June 17, 1977, petitioner Columbia Pictures Industries, Inc., *et al.* ("CPI") also moved to intervene in the district court proceedings (CPI Pet. 7). By minute order dated November 30, 1977, the district court denied CPI's motion (CPI Pet. App. 37a).

Meanwhile, the district court, relying on the voluminous record of comments and oral argument, entered the proposed judgment on November 28, 1977 (CPI Pet. App. 18a). It filed an opinion regarding the consent judgment on January 26, 1978 (CPI Pet. App. 38a-74a).[5]

The court of appeals affirmed the district court's denial of the motions to intervene (CBS Pet. App. A25). The court held that denial of intervention of right

[5]After the entry of judgment, but before the district court filed its opinion, CBS sought a writ of mandamus to require that the consent judgment be vacated. The court of appeals denied the petition without opinion, and CBS unsuccessfully sought review by this Court. *CBS Inc.* v. *United States District Court*, No. 77-3975 (9th Cir. Apr. 12, 1978), cert. denied, No. 78-1685 (Oct. 1, 1979).

pursuant to Rule 24(a)(2), Fed. R. Civ. P., was appropriate in this case because petitioners' interests were adequately represented by the government (CBS Pet. App. A22-A23). The court of appeals further held (*id.* at A23-A24) that the district court did not abuse its discretion when it denied permissive intervention under Rule 24(b)(2) in light of (1) the district court's consideration of petitioners' contentions as presented in their lengthy written comments, (2) the prospect of undue delay or prejudice to the adjudication of the rights of the government and NBC, and (3) the court's leaving open the possibility of further participation by CBS and CPI in the consideration of the decree, if appropriate, in the absence of intervention.[6]

ARGUMENT

The decision of the court of appeals is correct and consistent with the decisions of this and other courts. It does not merit further review.

1. The courts below properly concluded that petitioners were not entitled to intervene of right pursuant to Rule 24(a)(2). Intervention by right under Rule 24(a)(2) is available only where "the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." CBS's interest as a buyer and "in preserving competition among program suppliers" (CBS Pet. 14), and CPI's interest as a seller are no different from the general public interest in effective competition in this market. This public interest

[6]On November 7, 1977, after its motion to intervene had been denied, CBS moved for an evidentiary hearing on the proposed consent judgment (CBS Pet. in No. 78-1685 at 8).

in competition is, of course, important. Nevertheless, Congress has vested in the United States—not private parties—the representation of the public interest. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Cal. 1967), aff'd per curiam *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968). Thus, in federal antitrust litigation it is the United States "which must alone speak for the public interest." *Buckeye Coal & Ry.* v. *Hocking Valley Ry.*, 269 U.S. 42, 49 (1925); *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954).

Courts have regularly denied intervention to third parties, whether competitors, customers, or interested citizens, who have sought to intervene on the basis of their disagreement with the government's assessment of what could enhance competition. See, *e.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Associated Milk Producers, Inc.*, 534 F. 2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976); *United States* v. *Blue Chip Stamp Co.*, *supra*, 272 F. Supp. at 438-439; *United States* v. *CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970). Such is the case here, and, therefore, the court of appeals correctly concluded that the government adequately represented that interest (CBS Pet. App. A22-A23). *United States* v. *Hartford-Empire Co.*, 573 F. 2d 1 (6th Cir. 1978).[7]

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[7]Indeed, petitioners have not only failed to demonstrate the necessary interest and inadequate representation, but they have also failed to show that disposition of the action without intervention would impose a practical impairment on their interests. The NBC consent judgment does not preclude CPI from bargaining for better terms when it negotiates program licensing with NBC. CBS may protect its litigating position in the government's separate suit against it. CBS Pet. App. A15-A16; *United States* v. *Associated Milk Producers, Inc.*, *supra*, 534 F. 2d at 116 n.3.

Contrary to petitioners' assertions (CBS Pet. 14, 15, 22; CPI Pet. 10-12), *Cascade Natural Gas Co.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), does not mandate intervention here. The Court there allowed intervention of right in a government antitrust suit on remand, but it did so only because it found that the United States had "knuckled under" to El Paso and for three years had failed to carry out the Court's mandate of "divestiture without delay." *Id.* at 136. Consequently, *Cascade* has been interpreted as allowing intervention only to insure compliance with an earlier mandate. *United States* v. *Blue Chip Stamp Co.*, *supra*, 272 F. Supp. at 438; *United States* v. *Western Electric Co.*, 1968 Trade Cases para. 72,415 (D.N.J. 1968), aff'd per curiam *sub nom. Clark Walter & Sons* v. *United States*, 392 U.S. 659 (1968); *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd per curiam *sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970); *United States* v. *Paramount Pictures*, 333 F. Supp. 1100 (S.D.N.Y.), aff'd mem. *sub nom. Syufy Enterprises* v. *United States*, 404 U.S. 802 (1971). In the present case, there is no issue of compliance with the mandate of a court.[8]

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[8]Contrary to CBS's submission (CBS Pet. 17, 20), the decision of the court of appeals does not conflict with this Court's opinion in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972). That case involved a union member who sought to intervene in a suit brought by the Secretary of Labor pursuant to Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(b). That Act, unlike the antitrust laws, does not create an independent, private right of action and, as a consequence, intervention has been granted more freely. Note, *Intervention in Government Enforcement Actions*, 89 Harv. L. Rev. 1174, 1178 & n.13 (1976).

Nor is this a case where it can be claimed that the government "knuckled under" to the defendant in settling the case. To the contrary, the consent decree is entirely consistent with the position taken by the United States throughout the litigation (CPI Pet. App. 73a).

2. The court of appeals correctly rejected (CBS Pet. App. A23-A24) CBS's argument (CBS Pet. 23-26) that the district court abused its discretion when it denied permissive intervention.[9] The district court gave all persons a chance to present their views on the merits of the decree; petitoners did so at length. 42 Fed. Reg. 25126-25153, 25170-25253 (1977). It was well within the district court's discretion not to hold an evidentiary hering. No statute requires one, and the comments submitted pursuant to the APPA provided an adequate factual basis for the court's consideration of the decree. The court carefully considered the merits of the proposed decree and found that, although it displeased some persons by not going far enough and others by going too far, it was designed to address the competitive disadvantage caused by NBC's "enormous market power" (CPI Pet. App. 73a). In these circumstances, it was no abuse of discretion to deny permissive intervention. *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944). Moreover, since NBC and the government were about to settle their case, the result of intervention by a party hostile to the decree would most likely be delay. See, *e.g.*, *United States* v. *CIBA Corp.*,

[9]Fed. R. Civ. P. 24(b)(2) provides that

> Upon timely application anyone may be permitted to intervene in an action * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

supra, 50 F.R.D. at 514. Undue delay is reason enough for denial of permissive intervention under the express language of Rule 24(b)(2) (see note 9, *supra*).

3. Finally, the legislative history of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h) ("APPA") does not reflect congressional opposition to settlements in antitrust cases or an intent to broaden the existing right of intervention in consent-decree proceedings. Congress recognized that consent decrees are a "particularly valuable enforcement tool." 119 Cong. Rec. 3451 (1973) (Sen. Tunney); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). Thus, it had no intention of discouraging such settlements.

Moreover, while Congress intended a district judge to determine whether the entry of a consent judgment is in the public interest, this determination can be made based on information produced pursuant to the APPA. The provisions for public participation in the consent decree process set forth in the APPA insure that the public will have a fair chance to comment on proposed decrees and that the district court will have the benefit of that comment. Congress expected that the district court would "adduce the necessary information through the least complicated and least time-consuming means possible." S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974); 120 Cong. Rec. 36344 (1974). Intervention, though permissive under the APPA, 15 U.S.C. 16(f)(3), is not necessary to produce information which the APPA itself generates as part of the consent decree process. For this reason, the APPA was not intended by Congress to expand the right

to intervene (119 Cong. Rec. 24599 (1973) (Sen. Tunney)) and the courts have consistently denied intervention in consent-decree proceedings under circumstances similar to this case. *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29, 41-44 (W.D. Mo. 1975), aff'd, 534 F. 2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976); *United States* v. *Hartford-Empire Co., supra.*[10]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

JOHN J. POWERS, III
PETER L. DE LA CRUZ
Attorneys

NOVEMBER 1979

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[10]Contrary to petitioners' argument (CBS Pet. 12; CPI Pet. 10), Congress certainly did not intend that persons who would not otherwise qualify for intervention, should nonetheless be allowed to intervene so that they could take their dissatisfaction with consent judgments to federal appellate courts.

DOJ-1979-11

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-327

CBS INC.

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

No. 79-354

COLUMBIA PICTURES INDUSTRIES, INC., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

BERNARD G. SEGAL,
JEROME J. SHESTACK,
PETER S. GREENBERG,
Attorneys for Respondent National Broadcasting Company, Inc.

Of Counsel:
SCHNADER, HARRISON,
SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102
CORYDON B. DUNHAM,
JAY E. GERBER,
30 Rockefeller Plaza,
New York, New York. 10020

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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OPINIONS BELOW.

The Memorandum of Decision and Order of the United States District Court for the Central District of California, entered on June 20, 1977, denying CBS's motion to intervene pursuant to Fed. R. Civ. P. 24 is unreported and is set forth in the CBS Appendix at A-9. The Order of the District Court, entered on November 30, 1977, denying CPI's motion to intervene also is unreported and is set forth in the CPI Appendix at 37a.

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the denial of petitioners' motions to intervene was entered on June 4, 1979, and has not been reported. It is set forth at CBS Appendix A-18 and CPI Appendix 76a.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the denial of petitioners' motions to intervene was entered on June 4, 1979. The CBS petition for certiorari was filed on August 28, 1979 and the CPI petition for certiorari was filed on September 4, 1979. Petitioners invoke this Court's jurisdiction under 28 U. S. C. § 1254(1).

RULE INVOLVED.

Although petitioners attempt to create an issue of interpretation under the Antitrust Procedures and Penalties Act, 15 U. S. C. § 16, this case involves only the denial of petitioners' motions to intervene under Fed. R. Civ. P. 24.

QUESTIONS PRESENTED.

Whether petitioners' motions to intervene as of right were properly denied because petitioners failed to meet the specific requirements of Fed. R. Civ. P. 24(a)(2); and whether denial of petitioners' motions for permissive intervention were abusive of the District Court's discretion under Fed. R. Civ. P. 24(b)(2).

STATEMENT OF THE CASE.

National Broadcasting Company, Inc. ("NBC") files this brief in opposition to the petitions for writ of certiorari filed by petitioners, CBS Inc. ("CBS") and Columbia Pictures Industries, Inc. et al. ("CPI"). Both petitioners challenge the order of the United States Court of Appeals for the Ninth Circuit which affirmed the District Court's denial of petitioners' motions to intervene in proceedings in which the District Court approved a Final Judgment (generally referred to herein as "the Consent Decree") terminating **United States v. National Broadcasting Company, Inc.**, Civ. No. 74-3601-RJK (C.D. Cal.).

The Consent Decree at issue settled an antitrust action commenced by the United States against NBC in December, 1974. Petitioners were not parties to this lawsuit; however, at the same time that the Government filed its action against NBC, it filed virtually identical actions against CBS and American Broadcasting Companies, Inc. ("ABC"), the other two major commercial television networks. **United States v. CBS Inc.**, Civ. No. 74-3599-RJK (C. D. Cal.); **United States v. American Broadcasting Cos.**, Civ. No. 74-3600-RJK (C. D. Cal.).

In the course of the litigation, NBC and the Government entered into settlement negotiations and were able to reach agreement on a Consent Decree which was submitted to the District Court for approval on November 17, 1977. ABC and CBS, however, did not negotiate or agree to a consent decree and the respective actions against them are now proceeding to trial.

In order to reach settlement, NBC agreed to accept various injunctive restrictions principally dealing with NBC's own production of programs and NBC's acquisition of program rights from suppliers such as CPI. However, nothing in the NBC Consent Decree restricts CPI, which remains free to negotiate for different terms than those provided by the Consent Decree in contracts with NBC, or with ABC or CBS. Likewise, nothing in the Consent Decree restricts CBS, which remains entirely free to produce its own programs and to negotiate any terms it desires with its program suppliers.[1] CBS, of course, is also free to litigate the parallel antitrust suit brought against it by the Government—a suit which CBS is now vigorously defending.

Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U. S. C. § 16, the Government caused the proposed Consent Decree and a Competitive Impact

1. Additionally, in negotiating the Consent Decree, the Government recognized that it would be unfair to place NBC "at a competitive disadvantage with respect to CBS or ABC. . . ." (Competitive Impact Statement, at 13; *see* 41 Fed. Reg. 52015 (1976)). Thus, the restrictions on NBC's production and most of the restrictions on the terms that NBC may include in its contracts with program suppliers do not take effect unless and until similar restrictions are placed on ABC and CBS as a result of a consent decree or of a ruling by the District Court in favor of the Government upon completion of the respective cases against them.

Statement to be published in the Federal Register on November 24, 1976 (41 Fed. Reg. 51992 (1976)); it also caused a summary of the proposed Consent Decree and Competitive Impact Statement to be published in appropriate newspapers of general circulation during the period November 29-December 5, 1976. No claim is made that there was any lack of compliance with these requirements.

Following the procedures under the APPA, 15 U. S. C. § 16(d), numerous Comments regarding the Consent Decree were received and considered. CBS provided the District Court with a filing of over 150 pages, consisting of a 47 page set of Comments and six appendices totalling an additional 107 pages, including extensive affidavits from a professor of economics and from a professor of law specializing in antitrust law. CPI likewise filed a 52 page set of Comments.

In the District Court, and indeed in every proceeding since, CPI argued that the Consent Decree was inconsistent with the antitrust laws because it did not sufficiently restrict NBC. Conversely, CBS argued that the Consent Decree was inconsistent with the antitrust laws because it restricted NBC too much.

In addition to filing Comments, petitioners also moved to intervene in the District Court, relying essentially on the same arguments made in the Comments which they already had submitted. Indeed, CBS appended its Comments to its memorandum in support of its intervention motion; and CPI filed a memorandum in support of its motion that virtually tracked its Comments.

On June 20, 1977, the District Court denied the CBS motion to intervene, holding that:

> —CBS lacked the requisite interest to intervene because, *inter alia,* the Consent Decree placed no restrictions on CBS;
>
> —Any interest CBS might have would not be impaired, in light of CBS's ability to defend its parallel lawsuit and in light of the provision of the settlement which provided that many paragraphs of the NBC Consent Decree, including those most objected to by CBS, would not become effective unless the Government obtained similar remedies against CBS.[2]

(Memorandum of Decision and Order, June 20, 1977, at 7-8) (CBS App. A-9).

After the parties had reviewed the Comments and after further discussions between them, on May 4, 1977, the Government and NBC filed a stipulation and proposed order modifying the proposed Final Judgment.[3] On May 17, 1977, the Government filed a Certificate of Compliance with the provisions of the APPA.

On November 23, 1977, the District Court signed the proposed Consent Decree and on November 28, 1977, the

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2. See note 1, *supra,* p. 3.

3. The May 4, 1977 stipulation deleted a provision dealing with pay cable and modified a provision dealing with pilots. In addition, the parties entered into a stipulation concerning talent and literary exclusivity arrangements, which were not and are not covered by the proposed Final Judgment, and agreed that the May 4 stipulation would not create an estoppel as to the subject matter of the deleted pay cable provision or as to talent and literary exclusivity. These modifications were explained by the Government in the Memorandum of the United States Submitting Comments and Plaintiff's Responses Relating to the Final Judgment and Explaining Certain Changes in the Judgment, filed May 4, 1977 and published in the Federal Register on May 16, 1977 (42 Fed. Reg. 24995 (1977)).

Final Judgment was entered. The Court's opinion explaining its actions was filed on January 26, 1978 and entered on January 27, 1978. (CPI App. 38a).

In approving the Consent Decree, the District Court pointed out that the persons contesting the settlement, including CBS and CPI, had taken conflicting positions which the Court had considered "in light of the special interest of the respective proponents thereof." (CPI App. 64a).[4] This fragmented opposition to the settlement—the terms of which fell between the polarized positions of the commenting persons—and the fact that the Consent Decree was consistent with the relief sought in the Complaint (CPI App. 73a) were among the factors which persuaded the District Court to approve the Consent Decree.

Making clear that it had carefully considered all the extensive filings, including those of CBS and CPI, the District Court concluded that, under the discretion explicitly afforded by the APPA, it could approve the Consent Decree without the need for a hearing or other optional procedures. (CPI App. 68a-69a). On November 30, 1977, the District Court denied the CPI motion to intervene. (CPI App. 37a).

On December 20, 1977, CBS filed a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. This petition essentially tracked the arguments which CBS had made in three other places: in its motion for summary judgment filed in its own continuing litigation;[5] in its Comments on the Consent Decree; and in its motion to intervene. The petition for mandamus was denied on April 12, 1978, and rehearing was denied on February 5, 1979. CBS filed a petition for certiorari seeking review of that decision on May 7, 1979. This Court denied the petition on October 1, 1979.

4. As noted, CPI maintains that the Consent Decree is not restrictive enough, while CBS maintains that the Decree is overly restrictive.

At the same time that CBS was attacking the Consent Decree via mandamus, both CBS and CPI embarked on another tack of opposition by appealing from the District Court's denial of intervention. After oral argument, on June 4, 1979 the Court of Appeals for the Ninth Circuit affirmed the orders of the District Court denying petitioners' motions to intervene. (CBS App. A-18; CPI App. 76a). The Court of Appeals held that as to intervention of right under Fed. R. Civ. P. 24(a)(2), petitioners had not made the requisite showing that their interests were not "adequately represented" by the Government. The Court therefore did not reach respondents' arguments that petitioners also had failed to satisfy the other requirements of the Rule. The Court also held that the District Court's decision to deny permissive intervention under Rule 24(b)(2) was not an abuse of discretion.

CBS again filed a petition for certiorari and CPI did likewise.[6] Because both petitions raise the same issues, we shall respond to both in this Brief in Opposition.

5. This motion was denied by the District Court on February 9, 1977. (Memorandum of Decision and Order, February 16, 1977).

6. CBS, by letter dated August 28, 1979, requested this Court to "consider [its] two petitions for certiorari together . . . because both petitions arise from the same litigation and involve important issues relating to the proper interpretation and enforcement of the Antitrust Procedures and Penalties Act, 15 U. S. C. § 16(b)-(h)." Denial of the first CBS petition of course mooted this request.

ARGUMENT.

I. No Question Warranting Review Is Presented Concerning Interpretation of the APPA.

Both petitioners attempt to create the impression that this case involves a unique and novel question concerning an interpretation of the APPA.[7] This is not so. The only issues in the present petitions are narrow and typical questions concerning intervention of right and permissive intervention under Fed. R. Civ. P. 24. In resolving these questions, the courts below properly held that petitioners had failed to meet the very specific requirements for intervention under Rule 24, requirements which must be fulfilled regardless of whether the lawsuit in which a person wishes to intervene falls under the APPA.

The intent of Congress in passing the APPA was to create the equivalent of a "sunshine law" for consent decree approval proceedings. Senator John Tunney, one of the bill's sponsors, stated that it was his expectation that "the consent decree process will be opened up to significant public scrutiny, and judges will take a more active role in assessing the worth of proposed judgments." (120 Cong. Rec. 38585 (1974)).[8]

7. Petitioners here argue the same points CBS made in its first petition for certiorari, denied by the Court on October 1, 1979.

8. There is no indication that Congress intended to alter the long standing rule explicitly stated by this Court in **Sam Fox Publishing Co. v. United States**, 366 U. S. 683, 689 (1961), that:

> "[S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."

Accordingly, under the APPA, after a proposed final judgment is submitted to the Court, the Department of Justice must give thorough notice of the Decree and must provide a Competitive Impact Statement fully discussing the provisions of the Decree and the Department's decision to agree to them. 15 U. S. C. § 16(b), (c).

It is undisputed that this was done here. The scrutiny was undeniably a full one. As noted above, petitioners made extensive use of the opportunity to file Comments and affidavits in which they provided the District Court with lengthy arguments virtually identical to those relied upon in support of their motions to intervene.

Although the APPA provides that a District Court *may* allow participation in consist decree proceedings by intervenors, 15 U. S. C. § 16(f)(3), the matter quite clearly is discretionary with the District Court. Moreover, the statutory history makes clear that Congress believed that the comment procedure—so fully utilized in the present case—generally obviated any need for the highly unusual step of intervention by a private party in a Government consent decree proceeding, with its potential for delay and confusion. During Congressional consideration of the proposed Act, the Department of Justice had expressed explicit concern over interventions, observing that a permissive intervention procedure would create "considerable likelihood that substantial resources of the Antitrust Division will be tied up in judicial hearings throughout the country looking into the 'public impact' of consent decrees we file." (Letter from Assistant Attorney General Thomas Kauper to Senator Jacob Javits dated July 12, 1974, 119 Cong. Rec. 24601 (1973)).

As a result, Senator John Tunney made specific the intention of the Senate Judiciary Committee with the following statement on the floor of the Senate:

> "There should also be no misunderstanding about the intent of the bill with respect to potential private plaintiffs. We do not seek to open the floodgates to litigation, nor has anyone argued that the bill, in its final version and as it was endorsed by all members of the Judiciary Committee, would do so. Provision 2(f)(3) [15 U. S. C. § 16(f)(3)], which provides that a court may authorize participation in its proceedings upon a proposed consent decree by interested persons or agencies, *is not intended to broaden the existing right of intervention.*" 119 Cong. Rec. 24599 (1973) (emphasis added).[9]

9. By this statement, Senator Tunney amplified the intention of the Judiciary Committee that:

> "It is not the intent of the Committee to compel a hearing or trial on the public interest issue. *It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.* Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.
>
> Nor is Section 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs . . ." S. Rep. No. 93-298, 93d Cong., 2d Sess. 6 (1973) (emphasis supplied).

The same concerns are set forth in the House Report. The Report quotes the language of the Senate Report with respect to the preservation of the consent decree as a viable settlement option and states that section 2(f) [section 16(f)] is not "intended to authorize techniques not otherwise authorized by law." H. R. Rep. No. 93-1463, 93d Cong., 2d Sess. 9, *reprinted in* [1974] U. S. Code Cong. & Ad. News 6535, 6539. On the floor, the bill's manager, Rep. John Seiberling, made clear that no extension of intervenors' rights was intended:

> "[T]he bill expressly provides that while the court does not have any mandatory requirement to make further inquiries, it has the specific authority to do so, *an authority which it now has under its general equity powers* but which is spelled out in the proposed legislation along with some explicit statutory guidelines." 120 Cong. Rec. 36342 (1974) (emphasis added).

In similar terms Rep. Barbara Jordon emphasized that:

> "It is not the intention of the committee to require the courts to conduct a hearing or trial on the public interest question. *It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.*" 120 Cong. Rec. 36344 (1974) (emphasis added).

In sum, the Congressional history makes evident that the main purpose of the APPA was "to encourage additional comments and response by more adequate notice to the public," without the need for interventions, with all of the attendant problems, complexities and delays that such interventions inevitably involve. S. Rep. No. 93-298, 93d Cong., 2d Sess. 5 (1973). Indeed, the present case shows how well the statute works without the need for judicial modification, for petitioners were able to provide the District Court with extensive Comments concerning the NBC Consent Decree even though, as discussed below, petitioners were unable to meet the specific standards for intervention which remain unchanged after passage of the APPA.

9. (Cont'd.)

II. The Motions for Intervention Were Properly Denied.

A. Petitioners Have No Right To Intervene Under Fed. R. Civ. P. 24(a)(2).

Petitioners here cannot meet any of the standard requirements for intervention of right under Fed. R. Civ. P. 24(a)(2).[10] To prevail, petitioners must show:

(1) a specific interest relating to the subject of the action in which intervention is requested; and

(2) impairment or impeding of the ability to protect that interest; and

(3) lack of adequate representation of that interest by existing parties.

The first requirement is not met because petitioners lack the requisite interest. The Consent Decree governs only NBC. It imposes certain limitations upon NBC regarding contractual terms, in-house production, options, and exclusivity. However, there is no limitation upon suppliers such as CPI, or upon CBS. Both are free to negotiate whatever terms they desire.

CPI's claimed interest is that it would like the Decree to guarantee it even greater benefits. CBS's alleged interest, on the other hand, is derived from its view of business opportunities. It claims that the Decree regulates contract terms between NBC and suppliers to the benefit of the suppliers and limits the amount of product which NBC can produce on its own, and that this allegedly results in some sort of residual impact on the general market in which CBS competes.

10. Under Fed. R. Civ. P. 24(a)(2), a right to intervene exists only

> "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Neither petitioner thus shows an interest sufficient for intervention under Rule 24(a)(2). The CPI claim that it would like the Decree to do even more for it is a contention which, if sufficient under Rule 24(a)(2), would provide intervention of right for any person who might benefit under a consent decree and who would like to increase the benefits. Likewise, the CBS claim, aimed at preserving general business opportunities related to competition, does not constitute the "*direct and visible injury* to itself" which a person must show for intervention under Rule 24(a)(2). **United States v. CIBA Corp.,** 50 F. R. D. 507, 513 (S. D. N. Y. 1970) (emphasis added); *see* **Allen Calculators, Inc. v. National Cash Register Co.,** 322 U. S. 137 (1944); **Utah v. American Pipe & Construction Co.,** 50 F. R. D. 99, 102 (C. D. Cal. 1970), *modified on other grounds,* 473 F. 2d 580 (9th Cir. 1973), *aff'd,* 414 U. S. 538 (1974); **United States v. Blue Chip Stamp Co.,** 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968).

The second requirement under Rule 24(a)(2) also is not met by petitioners, since they fail to show that any interests which they might have were impaired or impeded by the NBC Consent Decree. For this reason alone, petitioners fail to meet the requirements of Rule 24(a)(2). *See* **Sam Fox Publishing Co. v. United States,** 366 U. S. 683, 689 (1961); **United States v. CIBA Corp.,** *supra,* 50 F. R. D. at 513; **Utah v. American Pipe & Construction Co.,** *supra,* 50 F. R. D. at 102; **United States v. Blue Chip Stamp Co.,** *supra,* 272 F. Supp. at 438.

As to CPI, it is unrestricted by the Consent Decree in its negotiations or in pursuit of its remedies. In fact, CPI and other program suppliers already have outstanding antitrust suits against ABC and CBS (*see* **Columbia Pictures Industries, Inc. v. American Broadcasting Cos.,** 1974-1 Trade Cas. ¶ 74,912 (S. D. N. Y.), *aff'd,* 501 F. 2d 894 (2d Cir. 1974)), raising issues involving network program production and acquisition. Additionally, in a pending proceeding before the Federal Communications Commission, program suppliers, including CPI, made virtually the same arguments that they have made in this Court and in the courts below concerning the various subjects dealt with in the NBC Consent Decree—renewal options, exclusivity, spin-offs, network facilities use, and network production of programs (*see* Comments of Motion Picture Association of America et al. in FCC Docket No. 21049 (June 1, 1977)).

As to CBS, it is free to litigate, and is currently litigating, the parallel antitrust suit brought against it by the Government. Until that suit is resolved, most of the provisions of the NBC Consent Decree (including those that are the basis of the CBS objections) do not take effect. In the interim, CBS is free to negotiate its own deals with suppliers as it has in the past.[11]

11. CBS argues that NBC, in anticipation of the Consent Decree's effective date, may implement provisions of the Decree before it is obligated to do so, thus creating new industry-wide standards. NBC, of course, is free to change the terms it negotiates in the ways suggested by CBS, with or without a consent decree; but whether it actually might do so is sheer speculation. Moreover, regardless of NBC's actions, CBS would be under no obligation to follow NBC's lead. In any event, this hardly constitutes the impairment of an interest necessary to sustain intervention.

CBS also argues that somehow it is prejudiced because the suit which CBS currently is litigating is before the District Judge who approved the NBC Consent Decree. This argument ignores the fact that courts can and regularly do approve settlements for one or more multiple defendants while litigation with other defendants continues. It is equally clear that a court's decision on one issue (such as whether to approve a settlement between the Government and NBC) has no *stare decisis* effect on a different issue (such as whether the Government can prevail on the merits against CBS) and does not warrant intervention. *See* **Blake v. Pallan,** 554 F. 2d 947, 954 (9th Cir. 1977). Moreover, the Decree itself, in its preamble, provides that it cannot be used in any other litigation.

The third requirement under Rule 24(a)(2) likewise is unmet because petitioners fail to show that their interests were not adequately protected by the parties.

CPI's position amounts to nothing more than the claim that the Government did not adequately represent CPI's interests because CPI disagrees with the Government's ultimate resolution of the case. Were this sufficient, courts would be required to find "inadequate representation" in every case where there was a private party who was dissatisfied with a consent decree negotiated by the Government. CPI's contention, of course, ignores the longstanding rule stated by this Court in upholding the denial of intervention in **Sam Fox Publishing Co. v. United States,** 366 U. S. 683, 689 (1961), that:

> "[S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any

claim of bad faith or malfeasance on the part of the Government in so acting." [12]

CBS, on the other hand, claims that the Government could not adequately protect its interests largely because the Government is litigating a parallel antitrust suit against CBS. But to the extent this is a problem for CBS, CBS is fully able to resolve it by actively litigating its own lawsuit. This is exactly what CBS is doing, and intervention in the NBC case was unnecessary.

Both petitioners rely on **Cascade Natural Gas Corp. v. El Paso Natural Gas Co.**, 386 U. S. 129 (1967), which is inapposite. In **Cascade**, this Court had directed the District Court to order the divestiture without delay of a company acquired in violation of Section 7 of the Clayton Act. Almost three years later, when the case next reached the Supreme Court, divestiture had not been directed; instead, the District Court had approved a settlement flatly inconsistent with the Supreme Court's mandate. Under these peculiar circumstances, the Court held that inter-

12. Consistent with the Supreme Court's statement in **Sam Fox**, courts have required a showing of bad faith or malfeasance on the part of the Government in order to find inadequate representation warranting intervention in connection with a consent decree negotiated by the Government. *See* **United States v. Associated Milk Producers, Inc.**, 394 F. Supp. 29, 41 (W. D. Mo. 1975), *aff'd*, 534 F. 2d 113, 117 (8th Cir.), *cert. denied*, 429 U. S. 940 (1976); **United States v. IT&T**, 349 F. Supp. 22 (D. Conn. 1972), *aff'd sub nom.* **Nader v. United States**, 410 U. S. 919 (1973); **United States v. Paramount Pictures, Inc.**, 333 F. Supp. 1100 (S. D. N. Y.), *aff'd sub nom.* **Syufy Enterprises v. United States**, 404 U. S. 802 (1971); **United States v. CIBA Corp.**, 50 F. R. D. 507, 513 (S. D. N. Y. 1970); **United States v. Blue Chip Stamp Co.**, 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States**, 389 U. S. 580 (1968). Here, the CPI appellants do not contend that the Government acted with the "bad faith or malfeasance" necessary to warrant intervention.

vention should have been granted, noting that the Government improperly had "knuckled under" to the defendants and had attempted to modify the Supreme Court's already existing mandate. 386 U. S. at 141, 136. Here—where the Government negotiated a settlement which, as petitioners make clear, falls in between their respective extreme positions—the facts do not even remotely resemble those presented by **Cascade. Cascade's** unique circumstances thus provide no support for petitioners' contentions.

B. The District Court Acted Within Its Broad Discretion in Denying Permissive Intervention Under Fed. R. Civ. P. 24(b)(2).

The District Court also properly denied petitioners' motions for permissive intervention under Fed. R. Civ. P. 24(b)(2).[13]

The granting of permissive intervention under Rule 24(b)(2) "by definition, lies in the discretion of the trial court . . . ." 3B **Moore's Federal Practice** ¶ 24.10[4], at 24,391 (2d ed. 1979). The discretionary denial of permissive intervention is "not reviewable by an appellate court unless clear abuse is shown . . . ." **Allen Calculators, Inc. v. National Cash Register Co.**, 322 U. S. 137, 142 (1944).

13. Rule 24(b)(2) provides in pertinent part that permissive intervention may be granted

> "when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The District Court's denial of intervention in this case clearly was a proper exercise of its discretion. In light of the full use by petitioners of the opportunities to state their views under the APPA procedures, including the filing of extensive Comments which were substantially identical to the papers filed in support of intervention, and the unrestricted ability of petitioners to protect their own remedies, the District Court's decision denying permissive intervention hardly can be deemed an abuse of the Court's discretion.

Courts traditionally have refused permissive intervention in antitrust cases for four reasons, each of which is pertinent here.

First, where the applicant claims, as the petitioners do here, to have a business interest in competition, its interest is viewed as substantially identical with and represented by the Government and therefore not recognizable as grounds for intervention.[14] *See* **United States v. Associated Milk Producers, Inc.**, 534 F. 2d 113 (8th Cir.), *cert. denied*, 429 U. S. 940 (1976); **United States v. Blue Chip Stamp Co.**, 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968).

Second, intervention is denied where it would result in the addition of numerous litigants to a Government's suit, making the management of the case far more time-consuming and perhaps even impossible.[15] *See* **Allen**

14. Also see discussion, *supra*, pp. 12-13.

15. CBS argues that "the concern that CBS's participation as a party would unduly complicate or delay the judicial public interest determination is no proper basis for denial of intervention."

Calculators, Inc. v. National Cash Register Co., 322 U. S. 137, 141-42 (1944); **United States v. Paramount Pictures, Inc.**, 333 F. Supp. 1100 (S. D. N. Y.), *aff'd sub nom.* **Syufy Enterprises v. United States,** 404 U. S. 802 (1971); **United States v. Aluminum Co. of America,** 41 F. R. D. 342 (E. D. Mo. 1967), *appeal dismissed,* 388 U. S. 457 (1967); **United States v. Blue Chip Stamp Co.**, 272 F. Supp. 432 (C. D. Cal. 1967); *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968); **United States v. Loew's Inc.**, 20 F. R. D. 423 (S. D. N. Y. 1957).

Third, consent judgments are regarded as central to the administration and enforcement of the antitrust laws, and intervention is particularly suspect where intended to defeat the entry of a consent judgment. *See* **United States v. National Bank & Trust Co.**, 319 F. Supp. 930 (E.D. Pa. 1970); **United States v. Atlantic Richfield Co.**, 50 F. R. D. 369 (S. D. N. Y. 1970); **United States v. Automobile Manufacturers Association,** 307 F. Supp. 617 (C. D. Cal. 1969), *aff'd sub nom.* **City of New York v. United States,** 397 U. S. 248 (1970).

15. (Cont'd.)
(CBS Petition, at 24). This argument of CBS is difficult to comprehend in light of the explicit language of Rule 24(b)(2) that:

> "In exercising its discretion the court shall consider whether the intervention *will unduly delay or prejudice* the adjudication of the rights of the original parties." (emphasis added).

The concern of Rule 24(b)(2) for delay and complication is particularly appropriate in a case under the APPA, which provides persons such as the present petitioners with ample opportunity to make their views known *without* intervention, and which provides the district court with the opportunity to utilize, in its discretion, various procedures to obtain information about the consent decree at issue. Whether or not such procedures were utilized is, contrary to CBS's suggestion, irrelevant to the question of intervention. As noted above, see pp. 8-11, *supra*, the rules and standards for determining the appropriateness of intervention remain unchanged by the passage and application of the APPA.

Fourth, where a consent decree does not restrict an applicant's remedies, discretion is generally exercised against intervention. *See* **United States v. Blue Chip Stamp Co.,** 272 F. Supp. 432 (C. D. Cal. 1967), *aff'd sub nom.* **Thrifty Shoppers Scrip Co. v. United States,** 389 U. S. 580 (1968); **United States v. Bendix Home Appliances, Inc.,** 10 F. R. D. 73 (S. D. N. Y. 1949). CBS, of course, is vigorously defending its own lawsuit, and CPI is pursuing its remedies in private suits and administrative proceedings.[16] Thus, as a discretionary matter, the District Court had no compelling reason for complicating the litigation by allowing intervenors to attempt to litigate their private positions in the Consent Decree proceedings.

16. See p. 14, *supra.*

CONCLUSION.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

BERNARD G. SEGAL,
JEROME J. SHESTACK,
PETER S. GREENBERG,

Attorneys for Respondent National Broadcasting Company, Inc.

Of Counsel:

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102

CORYDON B. DUNHAM,
JAY E. GERBER,
30 Rockefeller Plaza,
New York, New York. 10020

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-327

CBS INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N.Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N.Y. 10019

JOHN H. PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

December 5, 1979

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The briefs of both the United States and NBC in opposition* mischaracterize CBS's position. In particular, the Government repeatedly asserts that CBS complains that the proposed decree "went too far". (U.S. Br., pp. 3, 8) Similarly, NBC ascribes to CBS the view that the decree restricts NBC "too much". (NBC Br., p. 4)

The Government is apparently unwilling to face CBS's actual charge that the decree is demonstrably *anticompetitive* and hence itself violative of the procompetitive policy of the Sherman Act. CBS charged that the proposed decree was calculated to suppress competition, *inter alia,* by restricting NBC as a potential source of supply of television programming; that the Antitrust Division sought such a decree to "improve the lot" and enhance the rev-

* Those briefs are referred to herein as "U.S. Br." and "NBC Br.", respectively.

enues of program suppliers; and that a decree achieving that result was diametrically opposed to the Antitrust Division's mandate under the Sherman Act. In short, unlike virtually all other critics of government consent decrees, CBS did not urge that the decree accomplished too little or too much, but rather, more fundamentally, that the Antitrust Division had run amok and, faithless to the statute it was ostensibly enforcing, sought to drive up prices by curtailing potential production.

Because CBS is a major buyer in the relevant market with a direct, pocketbook interest in maximizing competitive sources of supply, it sought to intervene in order to demonstrate that a consent decree fashioned in this manner could not meet the public interest standard under the APPA (15 U.S.C. § 16(b)-(h)) and must, therefore, be rejected by the District Court. In support of its motion to intervene, CBS filed extensive affidavits of distinguished economists demonstrating the anticompetitive nature of the proposed consent decree. Those affidavits have never been rebutted. It is sufficient to emphasize here, however, that given the gravamen of CBS's pleading in intervention—that the Department here sought to suppress competition—the Ninth Circuit's holding that CBS's motion to intervene failed under Rule 24(a)(2), FED. R. CIV. P., because CBS was "adequately represented" by the Department is palpably erroneous. The Government's mischaracterization of CBS's position is thus simply an attempt to gloss over the fundamental issue presented. When, under the banner of the Sherman Act, the Department sets out to suppress competition, it cannot possibly be deemed an adequate representative of those with a direct interest in a competitive market.

Respondents' extraordinary misconstruction of the nature of CBS's grievances permeates their briefs in opposition and, once properly exposed, highlights CBS's entitlement to intervention.

1. Respondents' Claim That CBS Has No "Interest" as a Buyer and Producer of Programs Entitling It to Intervention as of Right.

The Government asserts that "CBS's interest as a buyer 'in preserving competition among program sellers' . . . [is] no different from the general public interest in effective competition in this market." (U.S. Br., p. 5) It cites no support for this proposition, and it simply does not make sense. Certainly CBS's interest as a direct and major purchaser of programs, whose profits are intimately related to program costs, is far more specific and compelling than that of the general public.

It is noteworthy that the Court of Appeals never reached CBS's claim of specific interest, and that the District Court appears to have disposed of it on the erroneous ground that CBS had not made a "conclusive showing on the present record" of the anticompetitive nature of the proposed decree.*

The cases cited by respondents in support of the proposition that CBS's interest is not sufficient for intervention as of right without exception involved a contention by the prospective intervenor that the relief agreed to by the Government was insufficient to restore or maintain competition in the industry involved. (U.S. Br., p. 6) Not a single one of them involved, as here, a well-pleaded (and documented) contention that the decree attacked would create a new and affirmatively anticompetitive regimen *in violation of* the antitrust laws.

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* As demonstrated in the Petition (pp. 17-19), this requirement of a "conclusive" and "compelling" showing of interest is completely without foundation or support. The Court of Appeals did not address it and respondents here do not attempt to support it.

In contrast to the cases cited by respondents, CBS's showing of interest here was stronger than that in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967)—where this Court squarely upheld intervention as of right by purchasers who contended that a proposed decree would not restore competition among suppliers.*

Respondents also fail to recognize that CBS's interest in this case was not solely that of a potential program buyer. For the Government seeks in *United States* v. *CBS Inc.*, Civil No. 74-3599-RJK (C.D. Cal.), a companion case involving identical issues before the very same Judge, to restrict CBS's production of programs for its own use. In such circumstances, CBS had a strong additional interest, as a producer of its own programs, in forestalling judicial approval—in a non-adversary context—of the Department's theory of the case and its proposed anticompetitive restrictions on network program production. Such approval could not help but adversely affect the Judge's perception of the merits of CBS's own case.

2. Respondents' Claim That CBS's Ability to Protect Its Interests Would Not Be Impaired as a Result of Entry of the Decree.

Respondents argue that CBS has failed to show that disposition of the action without intervention would as a practical matter impair its ability to protect its legitimate interests, since the provisions of the decree to which CBS objects would not take effect until and unless the Government

* The Government argues that lower courts have interpreted *Cascade* "as allowing intervention only to insure compliance with an earlier mandate". (U.S. Br., p. 7) While it would be presumptuous to inform this Court as to how it interprets its own decision, it is clear that none of the lower court cases cited by the Government involved any contention that the decree itself would create a new anticompetitive result.

obtains similar relief from CBS. (U.S. Br., p. 6 n.7; NBC Br., p. 14) While the District Court endorsed this position (App. II A-15 to A-16), the Court of Appeals did not reach it. (App. II A-22 to A-23)*

That argument is clearly misplaced and incorrect. In the first place, under the APPA the District Court had to determine whether the decree in its entirety was "in the public interest" as a condition precedent to its entry. Indeed, the District Court has now held that the decree satisfies the public interest standard without qualification or caveat. It would obviously have been wholly inappropriate for the District Court to have made that determination if, for whatever reasons, it was not satisfied on the question and was relying, sub silentio, on the possibility that further proceedings in *United States* v. *CBS* or *United States* v. *ABC* would resolve the doubt or preclude the operation of some provisions in the *NBC* decree. It cannot be assumed that the District Court engaged in a purely hypothetical exercise when it held that entry of the *NBC* decree was "in the public interest". It therefore follows that proceedings with respect to the decree in this action are the proper occasion to determine whether this decree does violence to the public policy declared by the Sherman Act as CBS claims. Where, as here, anticompetitive effects of grave significance

* The Government urges that it was proper for the District Court to deny permissive intervention because "since NBC and the Government were about to settle their case, the result of intervention by a party hostile to the decree would most likely be delay". (U.S. Br., pp. 8-9) Yet if avoidance of "delay" is an important consideration, it hardly lies in the Government's mouth to argue that nothing of moment will occur until after a final decision favorable to it in *United States* v. *CBS*.

Furthermore, under Section VII of the proposed decree, some of its provisions go into effect promptly after its entry. (Sections IV(A) and (B); VI(A), (B), (D), (E) (ii) and (iii)) See Appendix to CBS's petition for writ of certiorari in *CBS Inc.* v. *United States District Court for the Central District of California (Kelleher, D.J.), et al.* (No. 78-1685) ("App. I"), pp. 20a-37a.

to CBS are demonstrated, that determination cannot be deferred to another proceeding at another time. *See Denver & R.G.W.R. Co.* v. *United States,* 387 U.S. 485, 501-07 (1967).

In the second place, respondents' position ignores basic realities of the marketplace. With respect to the restrictions imposed on NBC's production of its own programs, it is true that NBC now produces very little programming. However, its preservation as a potential competitor in the production of programming is essential to the maintenance of a competitive market. Surely NBC will now be more cautious about committing large amounts of capital to programming or program production facilities with this Damoclean injunction dangling overhead. Equally important, the decree must diminish NBC's role as a perceived potential entrant since independent producers will recognize that NBC is now less likely to invest in expanded production efforts.

With respect to the decree's restrictions on the terms which NBC is free to negotiate with program suppliers, the District Court's imprimatur also increases the likelihood that the restrictions in the decree will be cited as the "legal norm" in future negotiations by suppliers with all of the networks. Thus, irrespective of whether it ever goes into force, the mere existence of such a judicially approved decree may adversely affect CBS's ability to acquire programs on freely negotiated terms.

In the third place, respondents ignore the unusual *stare decisis* effect which was likely to emanate from a later determination that the proposed decree was in the public interest, in a companion case involving the same plaintiff, the same issues and the same Judge. In this case, indeed, the District Court ultimately approved the decree in a lengthy opinion in which—without the benefit of any adversary litigation—it made various unfounded pronouncements, without evidentiary support, and considered restraints on production and on free negotiation of contractual terms to be "in the public interest" as declared in the Sherman Act. (App. I 80a)

The upshot is that CBS is now placed in the unenviable position of attempting to convince the same District Judge that its case is different from *United States* v. *NBC* although all concerned concede the complaints are identical. The Judge, having found that relief consistent with the Government's theory of liability is in the public interest, has necessarily at the least expressed the view that the status quo which CBS defends is *not* in the public interest. Thus, without any chance to participate or appeal, the ability of CBS to defend *United States* v. *CBS* has indeed been impaired. The practical adverse *stare decisis* impact emanating from the Court's denial of intervention is patent. *See Atlantis Development Corp.* v. *United States,* 379 F.2d 818 (5th Cir. 1967); *Nuesse* v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967); *New York Public Interest Research Group, Inc.* v. *Regents of the University of New York,* 516 F.2d 350 (2d Cir. 1975).

3. Respondents' Claim That the Department of Justice Could Adequately Represent the Interests of CBS, Its Target in an Identical, Pending Litigation.

Finally, respondents lamely argue that the Government was in a position adequately to represent CBS's interests in negotiating the terms of the *NBC* decree. The Government's contention appears to be derived from nothing more than its manifestly erroneous conclusion that CBS has no interest distinguishable from that of a member of the public. (U.S. Br., p. 6) It completely overlooks both CBS's interest as a program buyer in avoiding a decree imposing anticompetitive supply conditions and its interest as a liti-

gant in avoiding the stacked-deck precedent proposed by its "protector", the Department of Justice. (See p. 6-7, *supra*)

More generally, the Government's platitudinous assertion (U.S. Br., p. 6) that "Congress has vested in the United States, not private parties, the representation of the public interest" and that the United States "must alone speak for the public interest" leaves no room whatever for the APPA, which placed ultimate responsibility for determining the public interest in the district courts —aided by various procedures outlined in the Act, including intervention. The APPA and Rule 24 are, of course, peculiarly significant where, as here, there is a bona fide and well documented claim that the Antitrust Division has acted to subvert the purposes of the antitrust laws.

In short, for all the reasons discussed in the Petition at 19-23, CBS more than satisfied the "minimal burden" of showing that the Government's representation of its interests was inadequate. *See Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972).

CONCLUSION

This petition presents novel and important questions concerning the proper interpretation and application of the APPA and the method of review of district court determinations thereunder. The APPA, a new piece of remedial legislation, is designed to promote the procompetitive objectives of the antitrust laws and to end "judicial rubber stamping" of consent decrees in government antitrust cases.

Here the proposed decree was shown by unchallenged affidavits to be—and is on its face—an arrangement calculated to drive up the price of television programs by, *inter alia*, curtailing production and restricting freedom of negotiations. Had it been an agreement between purely private parties, it would be clearly seen as a classic cartel arrangement.

Notwithstanding such a formidable showing, the District Court denied CBS's petition for intervention on the theory that the Antitrust Division adequately represented whatever interests CBS had, and ultimately approved the decree on the ground that this was what the Division wanted—all in the best traditions of "rubber stamping". That court's actions strongly suggest that the broadly remedial purpose of the APPA can, and hereafter will, be all too easily frustrated, unless appropriate guidance from this Court is promptly obtained.

We accordingly respectfully urge that the petition for certiorari be granted.

December 5, 1979

Respectfully submitted,

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N. Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N. Y. 10019

JOHN H. PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005

WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006